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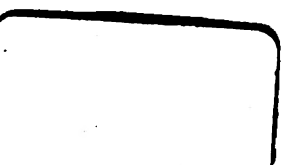
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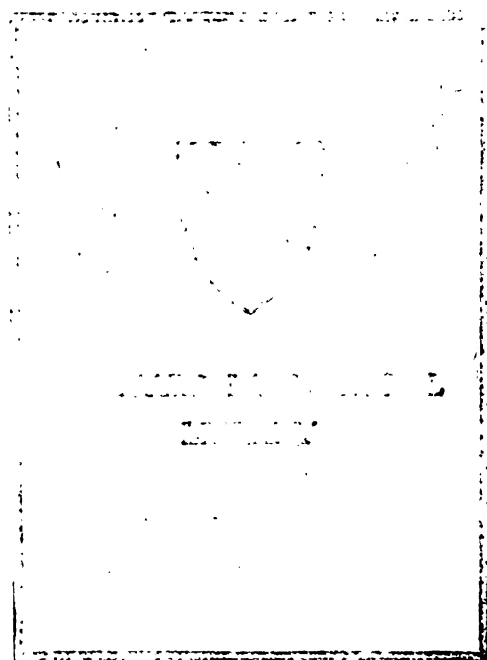
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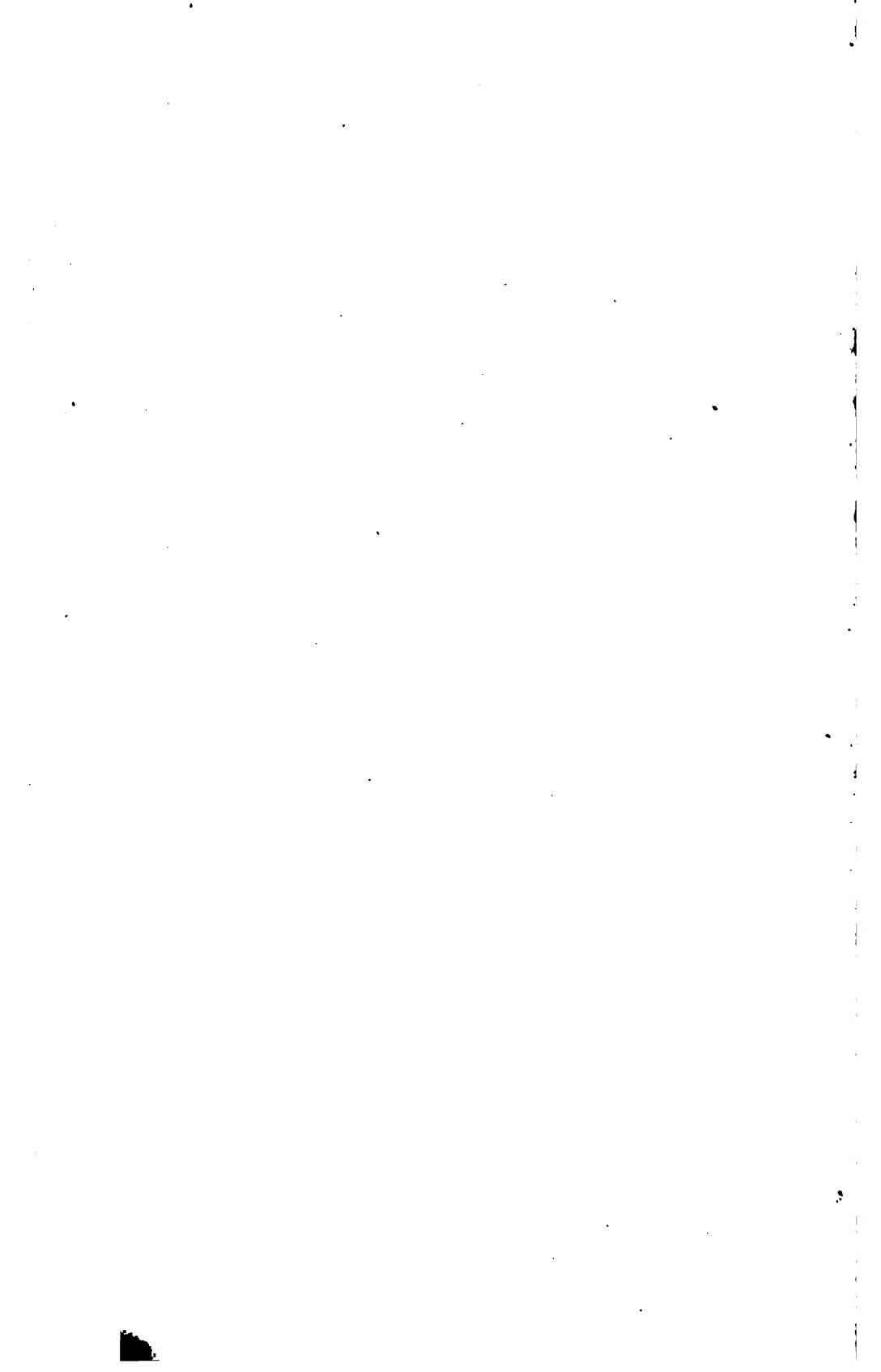
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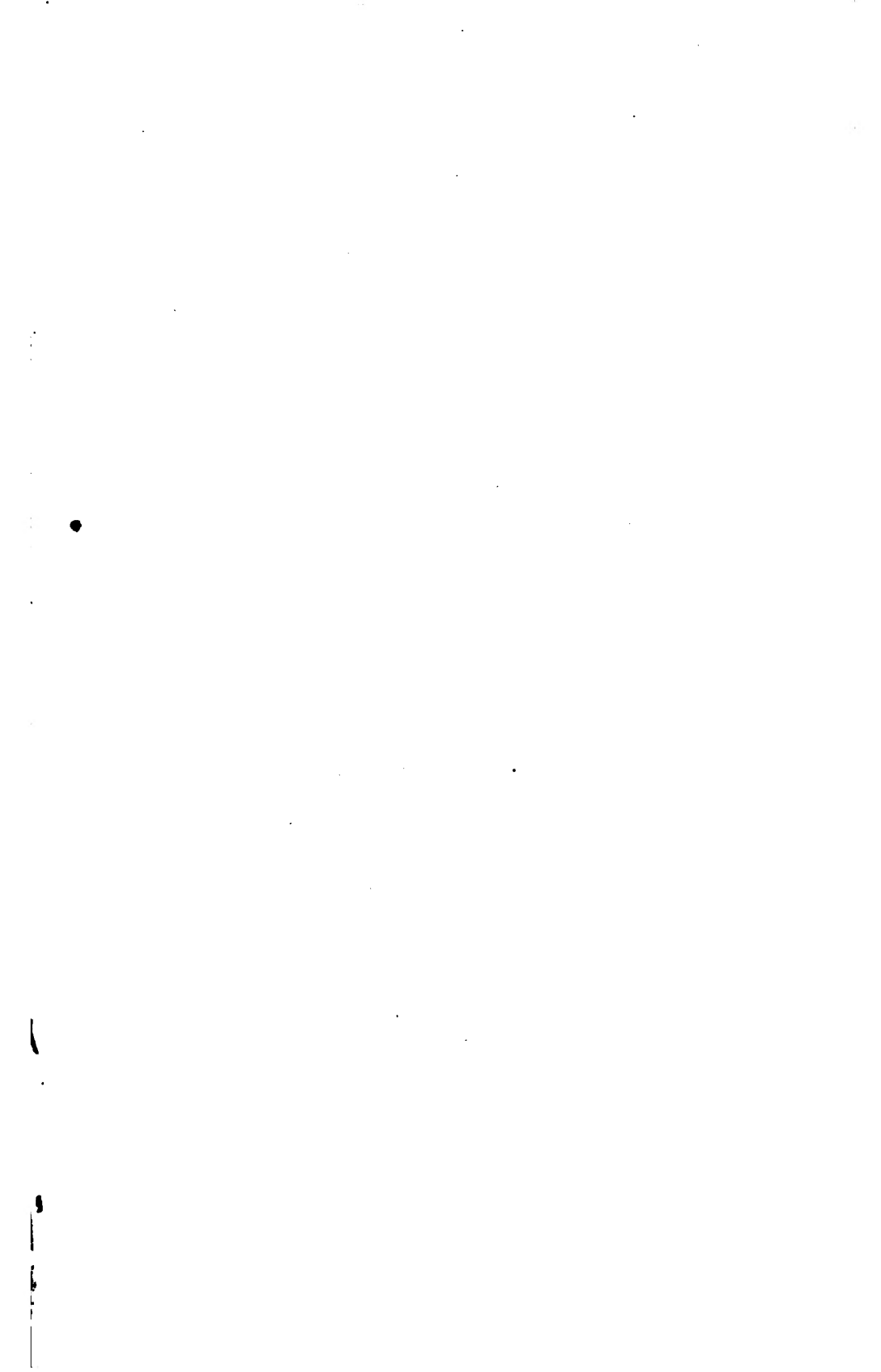


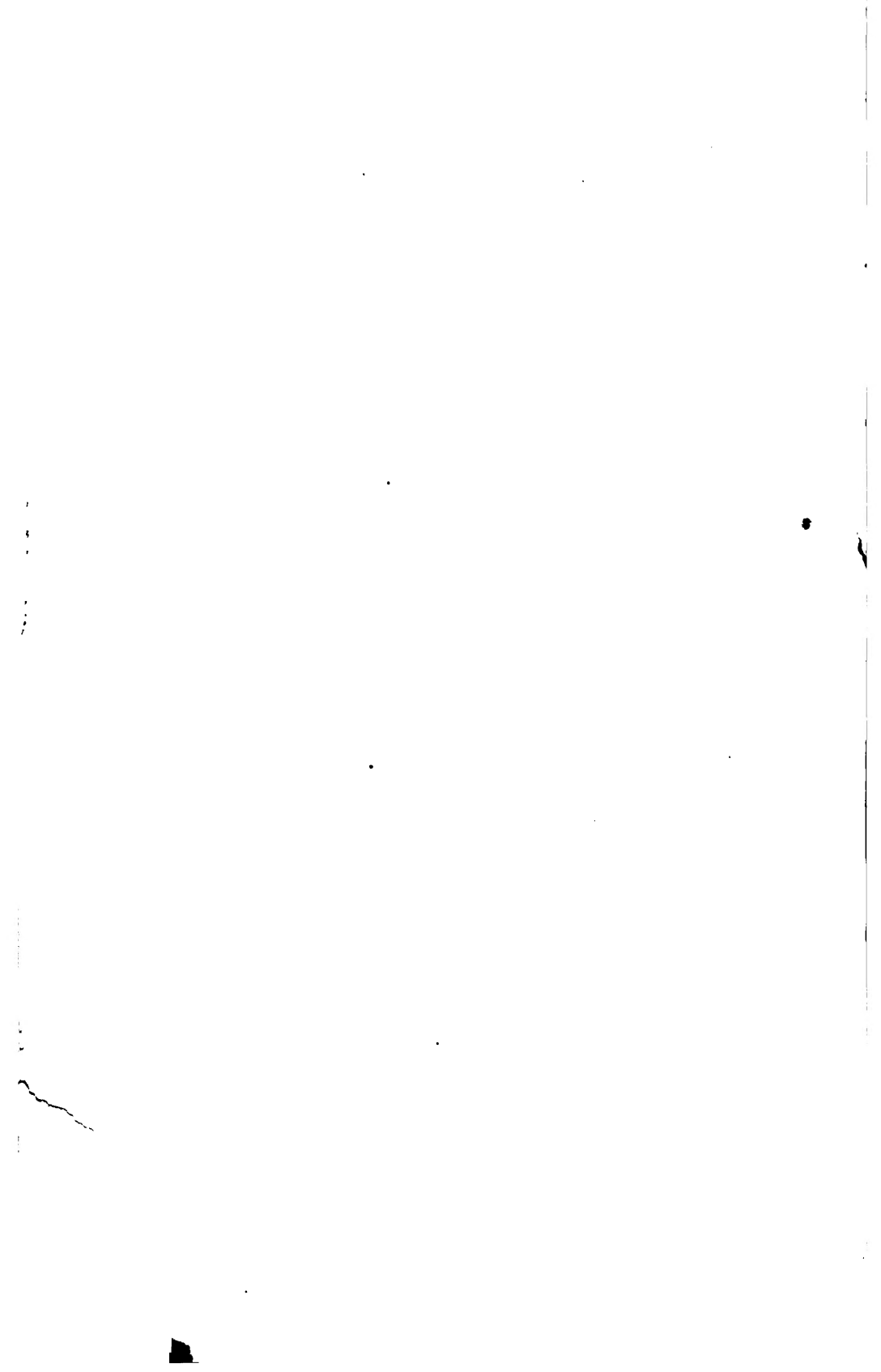


VOL. 67—IOWA REPORTS.

67	14	67	996	67	616
71	83	68	138	72	222
71	207	74	385	73	621
76	728	67	304	73	622
67	22	71	290	75	246
68	316	67	307	67	619
67	27	70	513	67	678
70	507	73	249	74	621
74	273	67	316	77	294
67	31	68	598	67	654
72	155	67	322	67	661
72	234	70	403	67	693
73	374	67	343	67	696
67	39	69	301	74	759
72	440	69	312	67	669
67	44	74	664	70	30
72	50	67	350	73	492
67	60	68	689	75	453
77	287	67	355	67	676
67	65	71	619	76	476
71	618	75	45	67	678
67	81	67	388	71	333
75	284	72	415	77	315
67	89	77	377	67	691
75	583	67	394	68	26
67	97	76	261	68	27
75	43	76	459	74	759
76	570	67	417	67	700
67	113	75	494	76	240
72	693	67	421	67	702
67	115	72	507	77	651
76	35	67	494	67	728
67	118	69	203	67	650
74	406	69	207	67	742
67	150	67	505	69	99
68	499	71	457	75	659
70	588	67	509		
72	47	71	642		
72	372	67	514		
74	735	68	714		
75	609	67	516		
76	376	74	216		
77	404	67	526		
67	175	75	579		
70	348	67	544		
67	190	77	469		
70	366	67	547		
67	196	75	666		
72	68	67	564		
72	429	74	563		
67	204	74	658		
68	371	67	591		
67	250	69	640		
69	98	77	606		
67	253	67	598		
75	67	76	291		
67	261	67	602		
69	679	69	44		
72	604	69	348		
73	114	70	319		
67	279	70	320		
72	75	71	246		
74	28	72	620		
67	284	72	621		
69	78	77	714		
67	292	67	606		
71	102	70	704		
		67	614		
		74	549		







REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

E. C. EBERSOLE,
REPORTER.

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JUDGES AND OFFICERS OF THE SUPREME COURT

AS AT PRESENT CONSTITUTED.

HON. AUSTIN ADAMS, Dubuque, Chief Justice.

" WILLIAM H. SEEVERS, Oskaloosa,	} Judges.
" JOSEPH R. REED, Council Bluffs,	
" JAMES H. ROTHROCK, Cedar Rapids,	
" JOSEPH M. BECK, Fort Madison,	

CLERK.

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A. J. BAKER, Centerville.

REPORTER.

E. C. EBERSOLE, Toledo.

JUDGES OF THE DISTRICT AND CIRCUIT COURTS,

AT THIS DATE.

1ST DISTRICT..	ABRAHAM H. STUTSMAN, District Judge. WILLIAM J. JEFFRIES, Circuit Judge. CHARLES H. PHELPS, Circuit Judge.
2D DISTRICT..	EDWARD L. BURTON, District Judge. H. C. TRAVERSE, Circuit Judge. DELL STUART, Circuit Judge.
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4TH DISTRICT..	CHARLES H. LEWIS, District Judge. DANIEL D. McCALLUM, Circuit Judge. GEORGE W. WAKEFIELD, Circuit Judge.
5TH DISTRICT..	WM. H. McHENRY, District Judge. JOSIAH GIVEN, Circuit Judge. JOHN H. HENDERSON, Circuit Judge. S. A. CALVERT, Circuit Judge.
6TH DISTRICT..	J. KELLEY JOHNSON, District Judge. W. R. LEWIS, Circuit Judge. GEORGE W. CROZIER, Circuit Judge.
7TH DISTRICT..	WALTER I. HAYES, District Judge. A. J. LEFFINGWELL, Circuit Judge. NATHANIEL FRENCH, Circuit Judge.
8TH DISTRICT	JAMES D. GIFFEN, District Judge. CHRISTIAN HEDGES, Circuit Judge.
9TH DISTRICT..	CARL F. COUCH, District Judge. WILLIAM HENRY UTT, Circuit Judge.
10TH DISTRICT..	L. O. HATCH, District Judge. CHARLES T. GRANGER, Circuit Judge.
11TH DISTRICT..	HENRY C. HENDERSON, District Judge. D. D. MIRACLE, Circuit Judge.
12TH DISTRICT..	GEORGE W. RUDDICK, District Judge. JOHN B. CLELAND, Circuit Judge.
13TH DISTRICT..	C. F. LOOFBOUROW, District Judge. J. P. CONNOR, Circuit Judge.
14TH DISTRICT..	LOT THOMAS, District Judge. J. H. MACOMBER, Circuit Judge.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		PAGE.
Adamson et al., Peterson v.	789	
Allen v. Bryson	591	
Allen et al. v. Pendergrast et al.	407	
Allison v. Graham et al.	68	
Ambrosen et al., Horton v.	270	
Applegate v. Winebrenner et al.	235	
Arnold v. Hawley	313	
Arnold Bros. v. Kreutzer & Wasem	214	
Atkinson v. Atkinson	364	
Atkinson v. Hancock & Co. et al.	452	
Atlee, Heitz v.	483	
B.		PAGE.
Babbet et al., Conger & Michael v.	13	
Baker v. Ryan	708	
Ball, State v.	517	
Bank of Carroll v. Taylor	572	
Barbee, Assignee, v. Hamilton, Sheriff	417	
Barker v. Town of Perry	146	
Barkley et al., Butler v.	491	
Beaver Valley Bank v. Cousins & Spooner et al.	310	
Beck, Iowa Falls & Sioux City R'y Co. v.	421	
Becket v. Iowa Improvement Co.	337	
Bedwell et al. v. Gephart	45	
Beecher, State v.	230	
Beems, Adm'r, v. Chicago, R. I. & P. R'y Co.	435	
Benepe et al., Thompson v.	79	
Bennett v. Parker	451	
Bentley et al., Trulock v.	602	
Billups et al., Council Bluffs Lodge v.	674	
Bissell et al., State v.	616	
Blandon v. Glover	615	
Blattner et al., McMillen v.	287	
Byler et al., Enfield v.	295	
Board of Equalization, Hutchinson v.	37, 182	
Board of Equalization, Iowa Union Telephone Co. v.	250	
Board of Supervisors, Central Iowa R'y Co. v.	199	
Boesch et al., Darling v.	702	
Bolton v. McShane	207	
Bond v. Wabash, St. L. & P. R'y Co.	712	
Bowe et al., Merrill v.	636	
Bowlin v. Lyon et al.	536	
Boyle v. Mallett	516	
Bradley v. Cole	650	
Bradley v. Johnson et al.	614	
Brainard v. Simmons, Garnishee.	646	
Brazill v. Toner et al.	369	
Breckenridge, State v.	204	
Brossart et al., Sawyer v.	678	
Brown, State v.	289	
Bryson, Allen v.	591	
Burger, by his next friend, v. Frakes	460	
Burkholder et al., Hubbard et al. v.	407	
Burlington, City of, v. Palmer ..	681	
Burlington, C. R. & N. R'y Co., Marling v.	331	
Burns et al., Evans v.	179	
Burroughs v. Saterlee et al.	396	
Burrows v. Frank et al.	502	
Butler v. Barkley et al.	491	
Butler v. Lewis	491	
Butler, State v.	643	
Byers v. Harris et al.	635	
Byers & Eggers et al., Carson, Pirie, Scott & Co. v.	606	
C.		PAGE.
Card v. Dale	552	
Carroll County, Pottawattamie County v.	456	
Carson, Pirie, Scott & Co. v. Byers & Eggers et al.	606	
Cedar Rapids, I. F. & N. W. R'y Co. et al., Chicago, I. & D. R'y Co. v.	324	
Central Iowa R'y Co. v. Board of Supervisors	199	
Central Iowa R'y Co., Farmer v.	136	
Chambers et al., Reeves v.	81	
Chaney, Circuit Judge, Wise v.	73	

	PAGE.
Chicago, B. & Q. R'y Co., Cunningham v.	514
Chicago, B. & Q. R'y Co., Lucas County v.	541
Chicago, B. & Q. R'y Co. v. Union Co.	541
Chicago, I. & D. R'y Co. v. Cedar Rapids, I. F. & N. W. R'y Co. et al.	324
Chicago, I. & D. R'y Co., Clayton v.	238
Chicago, I. & D. R'y Co., McClean v.	568
Chicago, M. & St. P. R'y Co., Maxon v.	226
Chicago, M. & St. P. R'y Co. v. Shea, County Treasurer.	728
Chicago, R. I. & P. R'y Co., Beems, Adm'r, v.	435
Chicago, R. I. & P. R'y Co., Eshelman v.	296
Chicago, R. I. & P. R'y Co., Robinson v.	292
Chicago, R. I. & P. R'y Co., Whitsett v.	150
Chicago, St. P., M. & O. R'y Co., Luce v.	75
Chicago, St. P., M. & O. R'y Co., Wallace v.	547
Christy v. Whitmore et al.	60
Citizens' Bank v. Rhutasel et al.	316
City of Burlington v. Palmer.	631
City of Council Bluffs, Morris v.	343
City of Des Moines v. Gilchrist et al.	210
City of Ottumwa, Shea v.	39
Clanton v. Des Moines, O. & S. R'y Co.	350
Clapp v. Forster et al.	49
Clayton v. Chicago, I. & D. R'y Co.	238
Colby v. King, Adm'r.	458
Cole, Bradley v.	650
Collins et al., Mills & Co. v.	164
Collins et al., Toner, Ex'r, v.	369
Collins et al., Williams v.	413
Commercial Exchange Bank v. McLeod et al.	718
Conger & Michael v. Babbet et al.	13
Continental Ins. Co., Webster v.	393
Cook v. Hamilton.	394
Co-operative Coal Co. et al., Freese & Ferguson v.	42
Coquillard, Kent v.	500
Cornett v. Phenix Ins. Co.	388
Council Bluffs, City of, Morris v.	343
Council Bluffs Ins. Co., Gere v.	272
Council Bluffs Lodge v. Billups et al.	674

	PAGE.
Cousins & Spooner et al., Beaver Valley Bank v.	310
Crosby, State v.	352
Cunningham v. Chicago, B. & Q. R'y Co.	514
Cuppy, Halstead v.	600

D.

Dale, Card v.	552
Daly v. W. W. Kimball Co.	132
Darling v. Boesch et al.	702
Davis v. Hull et al.	479
Davis v. Iowa State Ins. Co.	494
Davis et al., Siebold v.	560
Davis' Sons v. Robinson.	355
Dean v. Scott et al.	233
Decatur Co., Walker v.	307
Decoto, State v.	517
Decoto et al., State v.	517
Dennis, In re Estate of.	110
Des Moines, City of, v. Gilchrist et al.	210
Des Moines, O. & S. R'y Co., Clanton v.	350
Des Moines, O. & S. R'y Co., Wilson v.	509
Dietz, State v.	220
Dietz, Wischart v.	121
Donahue, Phinney v.	192
Downs, McGrew v.	687
Drennan et al. v. Graham et al.	161
Duffie, Hawkeye Ins. Co. v.	175

E.

Edmonds, Furchner v.	551
Edwards, Eikenberry & Co. v. 14,	619
Eikenberry & Co. v. Edwards, 14,	619
Ellsworth v. Savre.	449
Ellsworth v. Van Ort.	222
Else et al. v. Kennedy.	376
Enfield v. Blyler et al.	295
Eshelman v. Chicago, R. I. & P. R'y Co.	296
Estate of Dennis, In re.	110
Evans v. Burns et al.	179
Evans, State v.	517
Ewing, Jewett & Chandler v. Folsom et al.	65

F.

Farley v. Palen et al.	278
Farlie et al., White v.	623
Farmer v. Central Iowa R'y Co.	136
Farmer v. Hoffman, Judge, etc.	678
Farmers' Insurance Company, Hunt v.	742

CASES REPORTED.

7

	PAGE.
Farwell et al., Huff v.....	298
Fendrick v. Fendrick et al.....	518
Fenno et al., Trustees of Iowa College v.....	244
Field, Adm'r Iowa Falls & S. C. R'y Co. v.....	421
First National Bank of Albia v. Free.....	11
Fitzgerald, Kelso v.....	266
Fleming v. Town of Shenandoah.....	505
Foley et al., Hart et al. v.....	407
Foli, Peterson v.....	402
Folsom et al., Ewing, Jewett & Chandler v.....	65
Forster et al., Clapp v.....	49
Frakes, Burger, by his next friend, v.....	460
France v. Haynes et al.....	139
Frank et al., Burrows v.....	502
Free, First National Bank of Albia v.....	11
Freese & Ferguson v. Co-operative Coal Co. et al.....	42
French, Circuit Judge, Russell v.....	102
Frost et al., Paine v.....	282
Fry et al., State v.....	475
Fuller et al. Leyner v.....	188
Fuller et al. v. Page et al.....	407
Furchner v. Edmonds.....	551

G.

Garden Grove Bank v. Humeston & Shenandoah R'y Co...	526
Garmoe v. Sturgeon et al.....	700
Gephart, Bedwell et al., v.....	45
Gere v. Council Bluffs Ins. Co..	272
Getty & Born v. Tramel et al..	238
Gilchrist et al., City of Des Moines v.....	210
Glover, Blandon v.....	615
Goldsmith, assignee, v. Willson et al.....	662
Goodenow v. Parkinson.....	95
Goodnow v. Plumb.....	661
Goodnow v. Litchfield.....	691
Goodnow v. Wells et al.....	654
Goppinger et al., Hayden & Co. v.....	106
Graham et al., Allison v.....	68
Graham et al., Drennan et al., v.....	161
Grant v. Parsons et al.....	31
Green v. Town of Spencer.....	410
Grefe, Serrin et al., v.....	196
Gunsel v. McDonnell et al.....	521

H.

Halstead v. Cuppy.....	600
Hamilton, Cook v.....	394

	PAGE.
Hamilton, Sheriff, Barbee, Assignee, v.....	417
Hancock & Co. et al., Atkinson v.....	452
Hand v. Langland.....	185
Hanirick, Assignee, Knoxville Nat. Bank et al., v.....	583
Hardin County v. Wright County.....	127
Harris et al., Byers v.....	685
Hart, State v.....	142
Hart et al., v. Foley et al.....	407
Harwick et al., Sweetzer & Currier v.....	498
Hawkeye Ins. Co. v. Duffie....	175
Hawkeye Ins. Co., Meadows v.....	57
Hawley, Arnold v.....	313
Hayden & Co. v. Goppinger et al.....	106
Hayes, State v.....	27
Haynes et al., France v.....	139
Hietz v. Atlee.....	483
Herrick v. Musgrove.....	63
Hintrager, Smith et al v.....	109
Hoffman, Judge, Farmer v.....	678
Hoffman, State v.....	281
Hopkins, State v.....	285
Horton v. Ambrosen et al.....	270
House & Laub et al., Miller et al., Adm'rs, v.....	737
Hubbard et al. v. Burkholder et al.....	407
Huff v. Farwell et al.....	298
Huff v. Olmstead.....	598
Hughes v. Sweeney et al.....	93
Hulbert, Rice v.....	724
Hull v. Stogdell.....	251
Hull et al., Davis v.....	479
Humeston & Shenandoah R'y Co., Garden Grove Bank v.....	526
Hunt v. Farmers' Insurance Company.....	742
Hunter v. Waynick et al.....	555
Hutchinson v. Board of Equalization.....	37, 182
Hutchinson v. Wells et al.....	430

I.

In re Estate of Dennis.....	110
Iowa Falls & S. C. R'y Co. v. Beck.....	421
Iowa Falls & S. C. R'y Co. v. Field, Adm'r.....	421
Iowa Falls & S. C. R'y Co. v. Nichols.....	421
Iowa Falls & S. C. R'y Co. v. Nichols et al.....	421
Iowa Falls & S. C. R'y Co. v. Stone.....	421
Iowa Falls & S. C. R'y Co. v. Wentworth et al.....	421
Iowa Homestead Co., Snell v....	405

	PAGE.
Iowa Improvement Co., Becket v.....	337
Iowa Loan & Trust Co. v. Mowery et al.....	113
Iowa State Ins. Co., Davis v....	494
Iowa Union Telephone Co. v. Board of Equalization.....	250

J.

Jimeson, Rook v.....	202
Johnson v. Pennell et al....	669
Johnson v. Shank.....	115
Johnson et al., Bradley v.....	614
Johnston et al., Russell & Co. v.	279
Jones, White v.....	241

K.

Kelso v. Fitzgerald.....	266
Kennedy, Else et al. v.....	376
Kent v. Coquillard.....	500
Kimball (W. W.) Co., Daly v....	132
King, Adm'r. Colby v.....	458
Kirkendall, Wheeler v.....	612
Klinkenberg, Shuver v.....	544
Knoxville Nat. Bank et al. v. Hanirick, Assignee.....	533
Kreutzer & Wasem, Arnold Bros. v.....	214

L.

Lane v. Lane.....	76
Langland, Hand v.....	185
Lea v. Stevens et al.....	304
Lea v. Woods et al.....	304
Lewis, Butler v.....	491
Leyuer v. Fuller et al.....	183
Litchfield, Goodnow v.....	691
Long v. Smith.....	22
Lucas County v. Chicago, B. & Q. R'y Co.....	541
Luce v. Chicago, St. P. M. & O. R'y Co.....	75
Lundbeck v. Wiest et al.....	278
Lunt et al. v. Neeley et al.....	97
Lynd et al., Warfield, Howell & Co. et al. v.....	722
Lyon et al., Bowlin v.....	536

M.

Maben v. Maben.....	284
Madison Co., McAndrew v.....	54
Mallett, Boyle v.....	516
Marling v. Burlington, C. R. & N. R'y Co.....	331
Mathews v. Winchell et al....	149

	PAGE.
Maxon v. Chicago, M. & St. P. R'y Co.....	226
McAndrew v. Madison Co.....	54
McCleau v. Chicago, I. & D. R'y Co.....	568
McDonnell et al., Gunsell v....	521
McGrew v. Downs.....	637
McKee, Smith v.....	161
McKindley, Gilchrist & Co. v. Nourse, Assignee, et al.....	118
McLeod et al., Commercial Exchange Bank v.....	718
McMahon, State v.....	230
McMillen v. Blattner et al.....	237
McShane, Bolton v.....	207
Meadows v. Hawkeye Ins. Co..	57
Merrill v. Bowe et al.....	636
Miller, Schreiner v.....	91
Miller et al., Adm'rs, v. House & Laub et al.....	737
Miller, Ex'r, et al., Snyder v....	261
Mills County, Mills County Nat. Bank v.....	697
Mills County Nat. Bank v. Mills County.....	697
Mills & Co. v. Collins et al....	164
Montgomery v. Sutton.....	497
Morris v. City of Council Bluffs	343
Mowery et al., Iowa Loan & Trust Co. v.....	113
Musgrove, Herrick v.....	63

N.

Names v. Names.....	383
Neeley et al., Lunt et al. v.....	97
Nichols, Iowa Falls & S. C. R'y Co. v.....	421
Nichols et al., Iowa Falls & S. C. R'y Co. v.....	421
Norton, State v.....	641
Nourse, Assignee, et al. McKindley, Gilchrist & Co. v....	118

O.

Olmstead, Huff v.....	598
Orton, State v.....	554
Ottumwa, City of, Shea v.....	39

P.

Page et al., Fuller et al. v.....	407
Paine v. Frost et al.....	282
Palen et al., Farley v.....	278
Palmer, City of Burlington v....	681
Parker, Bennett v.....	451
Parkinson, Goodenow v.....	95
Parsons et al., Grant v.....	31
Pease et al., v. Thompson.....	70

TABLE OF CASES.

9

	Page.
Pendergrast et al., Allen et al. v.	407
Pennell et al., Johnson v.	669
Pennington v. Western Union Telegraph Co.	631
Perry, town of, Barker v.	146
Peterson, v. Adamson et al.	739
Peterson v. Foli.	402
Peterson, State v.	564
Phenix Ins. Co., Cornett v.	388
Phinney v. Donahue.	192
Plumb, Goodnow v.	661
Pollock et al. v. Simpson et al.	519
Pottawattamie County v. Carroll County.	456
Powers v. Strout.	341

R.

Rankin v. Rankin et al.	322
Redmon et al., Van Horn v.	639
Reeves v. Chambers et al.	81
Reno et al., State v.	587
Rhutasel et al., Citizens' Bank v.	316
Rice v. Hulbert.	724
Richardson, Searle v.	170
Robinson v. Chicago, R. I. & P. R'y Co.	292
Robinson, Davis' Sons v.	355
Rook v. Jimeson.	202
Rotherham et al., Wakefield v.	444
Rothschild Bros., Wise v.	84
Ruburg, State v.	230
Rump v. Schwartz.	471
Russell v. French, Circuit Judge	102
Russell & Co. v. Johnston et al.	279
Ryan, Baker v.	708

S.

Samson, Adm'x, v. Samson et al.	253
Saterlee et al., Burroughs v.	396
Savre, Ellsworth v.	449
Sawyer v. Brossart et al.	678
Schreiner v. Miller.	91
Schwartz, Rump v.	471
Scott et al., Dean v.	233
Searle v. Richardson.	170
Serrin et al. v. Grefe.	196
Servoss v. Western Mutual Aid Society.	86
Shank, Johnson v.	115
Shea v. City of Ottumwa.	39
Shea, County Treasurer, et al., Chicago, M. & St. P. R'y Co. v.	728
Shenandoah, Town of, Flem- ing v.	505
Shermerhorn v. Webber et al.	278
Shuver v. Klinkenberg.	544
Siebold v. Davis et al.	560

	Page.
Simmons, Garnishee, Brainard v.	646
Simpson et al., Pollock et al. v.	519
Singer Man'g Co., Tuck v.	576
Smith, Long v.	22
Smith v. McKee.	161
Smith et al. v. Hintrager.	109
Snell v. Iowa Homestead Co.	405
Snyder v. Miller, Ex'r, et al.	261
Spencer, Town of, Green v.	410
State v. Ball.	517
State v. Beecher.	230
State v. Bissell et al.	616
State v. Breckenridge.	204
State v. Brown.	289
State v. Butler.	643
State v. Crosby.	352
State v. Decoto.	517
State v. Decoto et al.	517
State v. Dietz.	220
State v. Evans.	517
State v. Fry et al.	475
State v. Hart.	142
State v. Hayes.	27
State v. Hoffman.	281
State v. Hopkins.	285
State v. McMahon.	230
State v. Norton.	641
State v. Orton.	554
State v. Peterson.	564
State v. Reno et al.	587
State v. Ruburg.	230
State v. Stevens.	557
State v. Wallace et al.	77
State v. Winebrenner.	230
Stetson et al., Swezey v.	481
Stevens, State v.	557
Stevens et al., Lea v.	304
Stogdell, Hull v.	251
Stone, Iowa Falls & S. C. R'y Co. v.	421
Strout, Powers v.	341
Sturgeon et al., Garmoe v.	700
Sutton, Montgomery v.	497
Sweeney et al., Hughes v.	93
Sweetzer & Currier v. Harwick et al.	488
Swezey v. Stetson et al.	481

T.

Taylor, Bank of Carroll v.	572
Thompson v. Benepe et al.	79
Thompson, Pease et al. v.	70
Toner et al., Brazill v.	369
Toner, Ex'r, v. Collins et al.	369
Town of Perry, Barker v.	146
Town of Shenandoah, Fleming v.	505
Town of Spencer, Green v.	410
Tramel et al., Getty & Born v.	288
Trulock v. Bentley et al.	602

	PAGE.		PAGE.
Trustees of Iowa College v. Fen-		Wentworth et al., Iowa Falls &	
no et al.	244	Sioux City R'y Co. v.	421
Tuck v. Singer Manf 'g Co.	576	Western Mutual Aid Society,	
		Servoss v.	86
U.		Western Union Telegraph Co.,	
Union Co., Chicago, B. & Q.		Pennington v.	631
R'y Co. v.	541	Wheeler v. Kirkendall.	612
		Whisler, Wood v.	676
V.		White v. Farlie et al.	628
Van Horn v. Redmon et al.	689	White v. Jones.	241
Van Orsdal v. Van Orsdal.	35	Whitman, Ex'r, Worthington v. 190	
Van Ort, Ellsworth v.	222	Whitmore et al., Christy v.	60
		Whitsett v. Chicago, R. I. & P.	
W.		R'y Co.	150
Wabash, St. Louis & Pacific R'y		Wiest et al., Lundbeck v.	278
Co., Bond v.	712	Williams v. Collins et al.	413
Wakefield v. Rotherham et al.	444	Willson et al., Goldsmith, As-	
Walker v. Decatur Co.	307	signee, v.	662
Wallace v. Chicago, St. P., M.		Wilson v. Des Moines, O. & S.	
& O. R'y Co.	547	R'y Co.	509
Wallace et al., State v.	77	Winchell et al., Mathews v.	149
Warfield, Howell & Co. et al. v.		Winebrenner, State v.	230
Lynd et al.	722	Winebrenner et al., Applegate v. 235	
Waynick et al., Hunter v.	555	Wise v. Chaney, Circuit Judge 73	
Webber et al., Shermerhorn v. 278		Wise v. Rothschild Bros.	84
Webster v. Continental Ins. Co. 393		Wisehart v. Dietz.	121
Wells et al., Goodnow v.	654	Wood v. Whisler.	676
Wells et al., Hutchinson v.	490	Woods et al., Lea v.	304
		Worthington v. Whitman, Ex'r, 190	
		Wright County, Hardin Coun-	
		ty v.	127

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
COUNCIL BLUFFS, SEPTEMBER TERM, A. D. 1885,

IN THE THIRTY-NINTH YEAR OF THE STATE.

PRESENT:
HON. JOSEPH M. BECK, CHIEF JUSTICE.
" AUSTIN ADAMS, }
" WILLIAM H. SEEVERS, } JUDGES.
" JOSEPH R. REED, }
" JAMES H. ROTHROCK. }

THE FIRST NATIONAL BANK OF ALBIA V. FREE.

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141	491

1. **Promissory Note:** DEPOSIT TO PAY: DEPOSIT STOLEN: AGENCY OF DEPOSITARY: WHO TO BEAR LOSS. Plaintiff's place of business was at A., but it held defendant's note payable at the town of I., but the person or place in I. to whom payment was to be made was not designated. Defendant left enough of money to pay the note with one M. at I., and notified plaintiff thereof, whereupon plaintiff wrote to M. to bring or send the money to A. But the money was afterwards stolen from M.'s house. *Held* that the deposit with M. was not a payment of the note, and did not stop the accumulation of interest; that M. was in no sense the agent of plaintiff, and that the facts stated were no defense to an action on the note.

Appeal from Appanoose District Court.

THURSDAY, SEPTEMBER 24.

ACTION upon a promissory note. The defendant pleaded certain facts as constituting virtually a payment. The plaintiff demurred to the answer, and the demurrer was sustained. The defendant elected to stand upon his answer, and judgment was rendered for the plaintiff. The defendant appeals.

Vermilion & Evans, for appellant.

T. B. Perry, for appellee.

ADAMS, J.—I. The note was made payable at Iconium, Iowa. The defendant averred in his answer, in substance, that before the note became due he deposited at Iconium, with one Maiken, the amount necessary to pay the note, of which fact the plaintiff was notified; that the plaintiff, located at Albia, Iowa, then wrote to Maiken, at Iconium, in these words: "We hold a note of \$147 on John Free, payable at Iconium, and we understand the money has been left with you for its payment. Next time any of you come to Albia, or if you sooner get a chance to send by a reliable party, please send it in, and oblige;" that Maiken held the money with the intent to either send it or take it to the plaintiff, but before he had an opportunity to do so his house was broken into and the money was stolen.

II. The defendant contends that the answer shows that the plaintiff adopted Maiken as its agent, and that Maiken was holding the money as such agent at the time it was stolen. But in our opinion this position cannot be sustained. The plaintiff did, it is true, propose to Maiken that he should carry or send the money to Albia. If Maiken had undertaken to do so, it may be that in doing so he would have been acting as the plaintiff's agent. But Maiken never acted nor agreed to act for the plaintiff. To constitute a person an

Conger & Michael v. Babbet et al.

agent there must be consent on the part of the agent, either expressed by words or inferable from something done. But in this case there appears to have been neither. We think that the demurrer was rightly sustained.

III. The note by its terms was to draw interest from date, if not paid when due: The answer showed that the money was deposited at Iconium and the plaintiff notified thereof before the note became due. The defendant contends that the deposit and notification at least should have had the effect to prevent the note from drawing interest. But the note by its terms was to draw interest unless paid when due. In the view which we have taken it was not paid at all. We think that the court did not err in rendering judgment for interest.

AFFIRMED.

CONGER & MICHAEL V. BABBET ET AL.

1. **Promissory Note: GUARANTOR: WHO IS: DEFENSE OF USURY BY.** One who writes on the back of a note, "I hereby indorse the within note," and signs his name, is a guarantor, under section 2089 of the Code, the same as if he had indorsed in blank, and as a guarantor he may set up as a defense to an action on the note usury in its inception. See authorities cited in opinion.

Appeal from Appanoose District Court.

THURSDAY, SEPTEMBER 24.

ACTION ON A PROMISSORY NOTE. Defense, usury. The plaintiff appeals.

Vermilion & Evans, for appellants.

Tannehill & Fee, for appellees.

SEEVERS, J.—This case comes before us on a finding of facts by the court. The finding is that the note at its incep

Eikenberry & Co. v. Edwards.

tion was usurious, and that the defendant Jacob Babbet, after the execution of the note, upon a sufficient consideration, guarantied the same by writing thereon the following words: "I hereby indorse the within note. JACOB BABBET." The single question we are required to determine is whether Jacob Babbet can avail himself of such defense. As he was not a payee of the note, but a stranger thereto prior to writing his name thereon, he is, under the statute, a guarantor. Code, § 2089. The writing on the note amounts, in legal effect, to a blank indorsement; it is neither more nor less. A guarantor is a surety. Brandt, Sur., 1; 2 Daniel, Neg. Inst., § 1753. A surety may avail himself of the defense of usury to the same extent as the principal can. Brandt, Sur., 202. *Wermer v. Shelton*, 7 Mo., 237; *Morse v. Hovey*, 9 Paige, 196; *Austin v. Fuller*, 12 Barb., 360; *Stockton v. Coleman*, 39 Ind., 106. And in *Huntress v. Patten*, 20 Me., 28, it is held that the guarantor of a contract tainted with usury is so far a party to the same that he may set up such defense. Following these authorities, we hold that there is no error in the record.

AFFIRMED.

EIKENBERRY & CO. V. EDWARDS.

1. **PRACTICE: EVIDENCE: CONTRADICTING WITNESS AS TO IRRELEVANT MATTERS.** A witness cannot be discredited by contradicting his statements as to irrelevant matters.
2. —: **EXCEPTING TO INSTRUCTIONS GIVEN: WHAT IS SUFFICIENT.** Where the charge consisted of fifteen instructions, and at the time when it was given the defendant caused an exception to be entered in the following words: "To the giving of each and every instruction the defendant duly excepts," held that defendant, under such exception, was entitled, on appeal to this court, to present his objections to any of the instructions, though he admitted that some of them were correct. *Hawes v. Burlington, C. R. & N. R'y Co.*, 64 Iowa, 315, followed.
3. —: **INSTRUCTING AS TO ESTOPPEL WHEN NOT PLEADED: ERROR**

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Eikenberry & Co. v. Edwards.

NOT CURED. In this case no estoppel was pleaded, and certain evidence offered by plaintiffs, and afterwards claimed by them to establish an estoppel, was relevant to the issues as they stood, and was admitted without objection on the part of defendant. Plaintiffs' counsel went outside of the issues and argued to the jury that the defendant was estopped by the evidence referred to, to which defendant's counsel did not object or reply; and the court instructed the jury that if they found certain facts to be established by the evidence the defendant would be estopped. *Held* that it was error so to instruct; that if the evidence tended to prove an estoppel it was not admissible for that purpose, because there was no such issue; that the error was not waived by defendant's failure to object to that evidence when offered, or his failure to object to the argument of counsel on the subject; and that it was not cured by plaintiffs' filing a reply, after verdict, pleading as an estoppel the facts which the evidence tended to prove, because on such issue defendant had not been heard, and could not properly have been heard, on the issues tried.

- 4. Estoppel in Pais: DEFINITION: FACTS NOT CONSTITUTING.** In order to constitute an estoppel *in pais*, the party pleading it must have been induced by the representations relied upon to so change his relations that he will suffer prejudice if the party who made them is permitted to assert the contrary. In view of this definition, *held* that an instruction to the effect that if defendant believed that his signature to the note in question was a forgery, but concealed that fact from the plaintiffs, and gave them to understand that it was genuine, and requested them to bring suit upon it against the makers, including himself, and they acted on this request, employed counsel and instituted the suit, he would be estopped from denying the genuineness of the signature, could not be sustained.

- 5. Principal and Agent: RATIFICATION: INSTRUCTION.** An instruction given in this case (see opinion) considered and *held* to have been given with the intention of presenting the question of estoppel, and not of ratification; or, if designed to present the question of ratification, it is erroneous, because it omits some of the essential elements of ratification, and takes from the jury the determination of defendant's purpose and meaning in the acts relied upon as constituting a ratification.

Appeal from Appanoose District Court.

THURSDAY, SEPTEMBER 24.

ACTION ON A PROMISSORY NOTE. There was a verdict and judgment for plaintiffs, and defendant appeals.

H. L. Dashiell, W. A. Nichols and George D. Porter, for appellant.

Stewart Bros., T. B. Perry and Tannehill & Fee, for appellees.

REED, J.—The note sued on purports to be signed by T. S. Sharp & Co., T. S. Sharp, D. M. Miller, Henry Miller, Lewis Miller and defendant. By its terms it was payable to the Monroe County Bank, or order. Written on the back is what purports to be an assignment of the instrument by the bank to plaintiffs, and a guarantee of payment. Defendant's name is signed to this writing as president of the bank. He answered under oath, denying the genuineness of both signatures. In a reply filed before the trial was commenced plaintiffs allege that the note was assigned to them by the bank for a valuable consideration, and that defendant acted for it in making such assignment, and that he thereby warranted the genuineness of the signatures of the makers, and that he was estopped by these facts from denying the genuineness of his signature to the note.

I. Plaintiffs reside and do business at Chariton, and the persons whose names are signed to the note reside at Albia.

One of the plaintiffs testified that D. M. Miller wrote to his firm requesting them to make a loan of \$2,500 to T. S. Sharp & Co., and that in obedience to this request he went to Albia, where he met Miller and the defendant, Edwards, and negotiated with them with reference to said loan, in the course of which they proposed that he should accept as security a mortgage on a certain brick building in Albia, belonging to Sharp & Co., but that he declined to accept such security for the reason that the building was then covered by mortgages amounting to \$4,000; that they then proposed that he should accept personal security, and stated that the persons whose names are signed to the note in suit would sign a note for

1. PRACTICE:
evidence: con-
tradicting
witness as to
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matters.

the amount of the loan; and that it was then agreed that they would procure the parties named to sign a note for the amount, which should be made payable to the Monroe County Bank, and that it would assign the same to plaintiffs and guaranty its payment, and that plaintiffs would pay over the money when the note was delivered to them, and that the note was subsequently sent to them, and they sent the money to the Monroe County Bank, of which defendant was president and Miller was cashier.

Defendant testified in his own behalf, denying that he was present at any such negotiation as testified to by plaintiff, or that he ever promised to sign said note, or that he had any knowledge of such transaction until long after the note was delivered to plaintiffs. He was then asked whether there was any mortgage on the brick building, referred to by plaintiff in his testimony, at the time the note purports to have been given. This question was objected to by plaintiffs as immaterial, and the objection was sustained. The same question was asked other witnesses, and excluded on the same ground. These rulings are assigned as error by defendant. These questions were asked with a view of contradicting the statement of plaintiff that the building was mortgaged at the time of the negotiation, and thereby discrediting his testimony. The statement was, however, quite immaterial. The material question in the case was whether defendant's signature to the note was genuine. Plaintiff testified to a negotiation in which he claimed that defendant agreed to sign it. In the course of his testimony he stated, as a reason why he declined to accept a mortgage on the building, that it was already mortgaged. But, in determining whether defendant signed or agreed to sign the note, the reason which influenced plaintiff to decline to accept the mortgage security would be entitled to no consideration whatever. The statement would doubtless have been excluded entirely if a motion to exclude it had been made. It was not relevant to the issue, or to any fact which was relevant. And the rule is

Vol. LXVII—2

well settled that a witness cannot be discredited by contradicting his statements as to irrelevant matters. 1 Greenl. Ev., § 462; *Nelson v. Chicago, R. I. & P. Ry Co.*, 38 Iowa, 564; *Clark v. Reiniger*, 66 Id., 507.

II: There was evidence tending to prove that, in a conversation which took place between the parties before the suit was instituted, defendant requested plaintiff to bring suit against all the makers of the note, including himself, and that the suit was instituted in pursuance of this request, and that defendant did not claim at that time that his signature to the note was a forgery. As applicable to the state of facts which this evidence tended to prove, the court gave the following instruction: "If you find that the defendant believed said note to be a forgery as to the signature, and concealed said fact from plaintiffs, but gave them to understand that it was genuine, and requested and induced the plaintiff to employ counsel and bring suit on the note against all the makers, including himself, you are instructed, that, if the plaintiffs acted upon said request of the defendant, and did employ counsel and bring suit upon said note, under the above state of facts the defendant would now be estopped from denying said signature to be his genuine signature, and your verdict should be for the plaintiffs."

Defendant assigns the giving of this instruction as error. Two grounds of objection are urged against the instruction: (1) That an estoppel arising out of the facts stated in the instruction was not pleaded; and (2) that said facts do not constitute an estoppel. Plaintiffs contend, however, that we cannot consider these questions, for the reason that no sufficient exception to the instruction was taken by defendant in the district court. The charge to the jury consisted of fifteen instructions, and at the time it was given the defendant caused an exception to be entered in the following words: "To the giving of each and every instruction the defendant, J. A. Edwards, duly excepts." Some of the instructions are now admitted to be correct, and plaintiff-

2. —: excepting to instructions given: what is sufficient.

iffs' position is that the exception is not sufficiently specific to raise an objection as to any one of them. We had occasion to consider the question raised by this objection in the case of *Hawes v. Burlington, C. R. & N. R'y Co.*, 64 Iowa, 315, and we held in that case that under the present statute an exception in substantially the same form was sufficiently specific, and that under it the appellant was entitled to present his objections to any one of the instructions. That the rule contended for by plaintiffs formerly obtained is certainly true. But, as pointed out in the case cited, the practice was modified by the Code of 1873.

Coming, then, to the first objection urged against the instruction, we have to say that it is well settled under our practice that a party is not entitled to introduce evidence tending to prove an estoppel unless he has specially pleaded the facts constituting such estoppel. See *Ransom v. Stanberry*, 22 Iowa, 336; *Phillips v. Van Schaick*, 37 Id., 236; *Folsom v. Star Union Freight Line*, 54 Id., 498.

Plaintiffs do not deny that this is the rule. They contend, however, that the error was waived by defendant by permitting the evidence which tended to prove the facts stated in the instruction to be introduced without objection, and by permitting plaintiffs' counsel, without objection, to argue to the jury that he was estopped by said facts to deny the genuineness of his signature. Also that the error was cured by an amended reply, which they (plaintiffs) were permitted to file after the verdict was returned, in which the facts stated in the instruction were pleaded as constituting an estoppel. But we are of the opinion that the error was not waived. The evidence which tended to prove said facts was relevant to the issue as it stood at the time it was offered. It tended to prove the conduct and statements of defendant with reference to the subject of the controversy. It had some tendency to prove the genuineness of his signature to the note, and was competent evidence to prove that fact. There was no

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 Eikenberry & Co. v. Edwards.

objection, then, which he could have urged successfully against its admission under the issue as then formed by the pleadings; and he was not called upon to contradict the statement of plaintiffs' counsel in his argument to the jury, that he would be estopped to deny the genuineness of his signature by the facts stated in the instruction, if they were proven. He might rely upon the court to instruct the jury correctly as to the questions which they were to determine, and he certainly could not be prejudiced by his failure to object to the act of his adversary in claiming more than he was entitled to claim under the pleadings. We are also of opinion that the error was not cured by the amendment to the reply. The question submitted to the jury by the instruction was one which the parties were not entitled, under the pleadings, to have determined by the jury. They were not entitled to be heard upon that question, and defendant was not heard upon it. His counsel did not argue it, but confined himself, as we are bound to presume, to a discussion of the questions arising under the pleadings. If the amended reply has the effect to cure the error, it follows that the defendant is now concluded as to a material question in the case upon which he has never been heard, and upon which he has never had the right to be heard. It seems to us too clear for argument that such a result cannot be attained under a correct administration of the law.

We come now to the second objection urged against the instruction. The jury were told by the instruction that if defendant believed that his signature to the note was a forgery, but concealed that fact from plaintiffs, and gave them to understand that it was genuine, and requested them to bring suit upon it against the makers, including himself, and they, acting on this request, employed counsel and instituted the suit, he would be estopped from now denying the genuineness of the signature. The effect of an estoppel *in pais* is to preclude the party from asserting a strict legal right, on the ground that his assertion of

4. ESTOPPEL
in pais: definition: facts not constituting.

such right, under the circumstances of the case, would be against equity and good conscience. The doctrine is applied to prevent the injustice which would result if one were permitted to deny the truth of a former representation, when by that representation he has induced another to so change his position with reference to the subject of the representation as that he would be damaged by the denial of its truth. It is an essential element to an estoppel *in pais* that the party had been induced by the former representations to so change his relation that he will suffer prejudice if the one who made them is permitted to assert the contrary, and it seems to us that this element is not included in the instruction. It is said that by instituting suit on the note plaintiffs incurred a liability for the costs and expenses of the suit, and that they will be prejudiced to that extent if defendant is permitted to deny the truth of the representations. The ready answer to this claim, however, is that he did not in any legal sense change his relation by instituting the suit. He did not by that act part with any interest or waive any rights; but, with reference to the note and the makers, his rights and interests remained precisely as they were before the suit was instituted. And whatever liability he incurred arose out of his effort to enforce his rights, and not out of any change in his relations.

III. Counsel for plaintiffs contend that the instruction can be approved on the ground that the facts stated in it, if proven, would show a ratification by defendant of the act of signing his name to the note. It is clear, however, from the language of the instruction that it was the intention of the court to submit to the jury the question of estoppel, and we think some of the essential elements of a ratification are omitted from it. One may become bound by a contract which another, without authority, has assumed to make in his name, by knowingly accepting its benefits, or by failing to repudiate it within a reasonable time after he is fully informed of the act. He may also become bound by giving his assent to it, or by an express

5. PRINCIPAL
and agent:
ratification:
instruction.

Long v. Smith.

promise subsequently made to perform the contract. In the one case the law conclusively presumes a ratification from the circumstances; in the other, the party is bound because he gives his consent to the act. No facts are stated in the instruction from which the law will presume a ratification. Defendant might have believed that his signature was a forgery, and yet not have had full information on the subject. It cannot be said, as matter of law, from the facts stated, that he failed to repudiate the act within a reasonable time after he acquired full information as to the facts of the transaction. and an assent to the act, or a promise to perform the contract, is not necessarily implied from the request to institute suit on the note. It was for the jury to say whether defendant intended to give his assent to the act, or whether he meant, by the request to plaintiff to bring suit upon the note, that he recognized it as binding upon him. The instruction, however, does not leave it to them to determine his purpose or meaning, but tells them, in effect, that if the request is proven the conclusion that he is liable follows necessarily. We think, therefore, that the instruction cannot be approved, either upon the theory that the facts stated create an estoppel, or that they amount to a ratification.

Other questions are argued by counsel, but in the view we have taken we do not regard them as material. The judgment is reversed, and the cause remanded for a new trial.

REVERSED.

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79	456

LONG V. SMITH.

1. **Practice in Supreme Court: DISMISSING APPEAL ON CONFLICTING AFFIDAVITS.** Where the affidavits relating to the grounds on which the dismissal of an appeal is asked are conflicting, the dismissal will not be granted.
2. —: **ERROR IN KIND OF PROCEEDINGS DISREGARDED.** Although this action should have been begun below as an action to redeem from

Long v. Smith.

a tax sale instead of an action to quiet title, yet, as no objection was made to the form of the action, it is treated and disposed of in this court according to its real nature and merits,—that is, as an action to redeem.

3. **Tax Sale: TERMS OF REDEMPTION FROM: SUBSEQUENT TAXES: STATUTE OF LIMITATIONS.** Defendant in this case had a valid tax certificate on which he had the right, at the commencement of this suit to redeem therefrom, to give the proper notice and take his tax deed. *Held* that the plaintiff (holder of the patent title) had the right to redeem, but to do so he was bound to pay the taxes and penalties provided by law, regardless of the statute of limitations. *Harber v. Sexton & Son*, 66 Iowa, 211, followed; *Brown v. Painter*, 44 Iowa, 363, and subsequent like cases, distinguished.

Appeal from Guthrie District Court.

THURSDAY, SEPTEMBER 24.

THE plaintiff in his petition claims to be the absolute owner of a certain eighty acre tract of land. He avers that the defendant makes some claim to the same, and prays that his title be quieted as against the defendant. The defendant by his answer claims title to the land by virtue of a tax sale and deed. The plaintiff in his reply alleges that the tax deed is invalid because the proper notice of the expiration of the time for redemption was not given as required by statute, and he offers to pay "whatever amount of taxes paid by defendant, which the court may find due the defendant, for five years last past before the bringing of this action; but prior to that time, and beyond five years back, plaintiff alleges that defendant's claim for taxes paid is fully barred by the statute of limitations." The court found that the plaintiff was entitled to redeem the land from the tax sale, and set aside the tax deed, and decreed that redemption should be made by paying all taxes, penalties and interest which accrued within five years of the commencement of the action. Defendant appeals.

C. A. & J. G. Berry and *J. S. McCaughan*, for appellant.

II. E. Long, appellee, *pro se*.

ROTHROCK, J.—I. The appellee presents a motion to dismiss the appeal upon the alleged ground that at the time the appeal was taken the defendant, Scott E. Smith, had no interest in the subject of the action, he having by his quit-claim deed released all the interest he had in the land to E. W. Smith. The motion is supported by affidavits to the effect that such a deed is on record in the recorder's office, and that it purports to have been signed and acknowledged by Scott E. Smith and Hester A. Smith, his wife, before this action was commenced. The defendant, Scott E. Smith, died after the appeal was taken, and the proper substitution of parties was made in this court. The parties defendant resist the motion to dismiss by the affidavit of Hester A. Smith, in which she denies that she or her husband ever executed any such deed. The fact of the transfer of the land having been denied in this emphatic manner precludes us from entertaining the motion. It raises an issue of fact which, if determined in plaintiff's favor, defeats the defendant's right of appeal, and this fact ought not to be determined upon conflicting affidavits.

II. There was an agreed statement of the facts in this case, which shows that the land in question was duly and legally sold to E. W. Smith by the county treasurer on the first day of November, 1875, for the delinquent taxes of 1874, and that E. W. Smith afterwards assigned the tax-sale certificate to the defendant, Scott E. Smith, who attempted to give the notice of expiration of redemption required by law. The notice and the proof thereof were so defective that the treasurer was not authorized to execute a deed to Scott E. Smith. But a tax deed was made, executed and delivered on

the twenty-fourth day of November, 1880. The land was owned by one F. C. Vogle, and on the eighth day of March, 1882, he conveyed the same to the plaintiff, Long, by deed in fee, without warranty, and "said Long paid for said land the full sum of \$50;" and at the time of his purchase he knew that the land had been sold for taxes, and that there had been a tax deed executed and delivered in pursuance of the sale. It further appears that the assessment of the land, the levy of the taxes and the sale by the treasurer were in all respects regular and in compliance with the statute, and that the taxes had not been paid. The plaintiff had the right to make redemption from the sale, and, as incident to this, he had the right to a decree annulling the tax deed as a cloud upon his title. He should have commenced an action to redeem, because that was the relief he was entitled to demand. Instead of this, however, he commenced an action to quiet his title, and made no offer to redeem. When the tax claim was set up in the answer, he replied by making a qualified offer to redeem from all taxes paid by Smith within five years. If proper objection had been made to this manner of pleading in the court below, and the objection had been sustained and the plaintiff sent out of court, with an admonition to commence such an action as the facts authorized him to maintain, by a petition with proper averments, we incline to think such a ruling would be sustained. No such motion or objection having been made in the district court, and the case having been allowed to go to decree, we have concluded to treat the action in this court as it ought to be regarded, and that is as an action to redeem from a tax sale, because the time for redemption had not expired. It is provided by section 894 of the Code that the right of redemption from a tax sale shall not expire until ninety days after the service of a proper notice of the expiration of redemption. The amount of money required to redeem is a mere matter of mathematical calculation. It is the amount for which the land was sold for taxes, and the penalties and

interest provided by law. The plaintiff insists, however, and the district court held, that he is not required to redeem from the sale at all, but only from such taxes as were paid within five years before the commencement of the suit, and certain cases determined by this court are cited in support of the claim that taxes paid more than five years before the action was commenced are barred by the statute of limitations. It is sufficient to say that the cases cited are not in point. They are all cases where the tax sale was irregular, or the deed void by reason of some inherent invalidity, and the tax sale purchaser sought to recover taxes paid by him at the sale or afterwards. See *Brown v. Painter*, 44 Iowa, 368; *Callanan v. Madison Co.*, 45 Id., 561; *Sexton v. Peck*, 48 Id., 250; *Thode v. Spofford*, 65 Id., 294.

In the case at bar the defendant does not seek to recover taxes. He has a valid tax-sale certificate upon which he had the right, at the commencement of this suit, to give the proper notice of expiration of redemption, and take his deed in ninety days after the service of the notice. The plaintiff had the right to redeem from the *sale*, and to do so he was bound to pay the taxes and penalties provided by law, regardless of the statute of limitations. See *Harber v. Sexton*, 66 Iowa, 211.

The decree of the district court fixing the amount to be paid in redemption is reversed, and the cause is remanded for an account of the taxes and penalties to be taken in accord with this opinion.

REVERSED.

THE STATE V. HAYES.

67	27
695	377
67	27
126	297

1. **Criminal Procedure: TRIAL WITHOUT PLEA: NO PREJUDICE—NO REVERSAL.** Where defendant was given time to plead to the indictment, but he neglected to do so, and through inadvertence the cause went to trial without any plea, but was tried in all respects as if a plea of not guilty had been entered, *held* that defendant was not prejudiced by the irregularity, and that a judgment of conviction upon a verdict of guilty should not be set aside on that ground. *State v. Greene*, 66 Iowa, 11, followed.
2. **Criminal Law: NUISANCE: SALE OF LIQUORS BY CLERK: INTENTION OF PRINCIPAL: CODE, § 1543.** Defendant was charged with nuisance, under section 1543 of the Code, for keeping a place for the unlawful sale of intoxicating liquors. *Held* that if he kept the liquors with the intent that they should be sold only for lawful purposes, and himself made only lawful sales of such liquors, he was not criminally liable on account of unlawful sales thereof made by his clerk,—the unlawful intent being an essential ingredient of the crime.

Appeal from Story District Court.

FRIDAY, SEPTEMBER 25.

THE defendant was accused, by indictment, of the crime of nuisance. He was tried by a jury, and found guilty, and the court sentenced him to pay a fine and the costs of the prosecution, and from this judgment he appeals.

F. D. Thompson, for appellant.

A. J. Baker, Attorney-general, for the State.

REED, J.—I. The indictment was returned on the twenty-third day of August, 1883. Afterwards, during the same term of court, defendant appeared and waived the arraignment, and further time was given him within which to plead, and the cause was continued. At the next term defendant was put upon his trial. It does not appear from the record that

1. CRIMINAL
procedure:
trial without
plea: no pre-
judice—no re-
versal.

The State v. Hayes.

he ever pleaded to the indictment. The cause was tried, however, in every respect as though a plea of not guilty had been entered. It is now insisted that the court erred in placing defendant on trial without a plea to the indictment having been entered. The case, in this respect, is like *State v. Greene*, 66 Iowa, 11, in which we held that the error in putting the accused on trial without a plea having been entered was a mere technical error or irregularity, which did not affect the substantial rights of the parties, and afforded no ground for reversing the judgment. We are satisfied of the correctness of our holding in that case, and, under the rule there laid down, we cannot disturb the judgment in the present case on this ground.

II. It is charged in the indictment that defendant occupied and used a building and place in which he kept intoxicating liquors, with intent to sell the same contrary to law. It was proven on the trial that defendant was engaged in the business of keeping a drug-store. Also that he was a registered pharmacist, and that he held a permit from the board of supervisors of the county authorizing him to sell intoxicating liquors for medicinal, mechanical, culinary and sacramental purposes. It was also proven that he kept intoxicating liquors in his store, and that numerous sales of such liquors had been made in the place. Some of these sales were made by the defendant in person, while others were made during his absence from the store by a clerk or salesman in his employ. Defendant was examined as a witness in his own behalf, and testified that he kept the liquors which were in his store with intent to sell the same strictly as medicine, and that all sales made by him in person were made on the representations by the purchasers that they desired the liquors for medicinal purposes only. The court instructed the jury that "if the owner or proprietor of any building or place in which intoxicating liquors are unlawfully kept or sold employs any clerk, servant, agent or bar-tender,

2. CRIMINAL
law: nuisance:
sale of liquors
by clerk: in-
tention of
principal:
Code, § 1543.

The State v. Hayes.

or other employe, in conducting or managing, or aiding to conduct or manage, the business of keeping or selling such intoxicating liquors, the owner or proprietor is equally liable for his own unlawful acts, and for the acts of his servant, clerk, agent, bar-tender or other employe, in keeping or selling such liquors unlawfully."

One proposition involved in this instruction is that if the owner or proprietor of the building or place is engaged in the business of selling intoxicating liquors contrary to law, or keeping them with intent to so sell them, he is criminally liable for the unlawful acts of his servant or agent done in the course of the business. The soundness of this proposition cannot be doubted. But an unlawful sale of intoxicating liquors may be made by an agent or servant when such liquors are kept by the principal only for lawful purposes. This would be the case where the principal held a permit to sell for medicinal, mechanical, culinary and sacramental purposes, and kept the liquors with intent that they should be sold only for those purposes, and his agent or clerk should, without his knowledge or authority, make sales of such liquors for other purposes. Under the evidence in this case, the jury might have found that very state of facts, and the instruction, we think, authorized them to convict the defendant on proof of that state of facts.

The question, then, is whether defendant, if he kept the liquors with intent that they should be sold only for lawful purposes, and himself made only lawful sales of such liquors, is criminally liable on account of unlawful sales thereof by his clerk. The offense of which defendant is accused is defined by section 1543 of the Code, which is as follows: "In cases of the violation of the provisions of the three preceding sections, or of section 1525, of this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture or sale, or keeping with intent to sell, of intoxicating liquors is carried on or continued or exists, is hereby declared a nuisance, and may

The State v. Hayes.

be abated as the law directs. And, in addition to the penalties prescribed in said sections, whoever shall erect or establish or continue or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly in the manner provided by law. *

* ** The preceding sections to which reference is made are those which prescribe the penalties which shall be inflicted for the manufacture or sale, or keeping for sale, of intoxicating liquors contrary to the provisions of the chapter. Section 1540 provides that if any person, by himself, or by his agent or servant, shall sell any intoxicating liquors contrary to the provisions of the chapter, he shall be deemed guilty of a misdemeanor, and shall be punished by fine and imprisonment; and section 1542 prescribes a penalty for owning or keeping such liquors with intent to sell the same contrary to law.

It will be observed that the first provision of section 1543, quoted above, defines the conditions or circumstances which will render the building or place a nuisance and subject it to abatement, and that the following provision points out the particular acts which will subject the person committing them to the punishment prescribed by law for the crime of nuisance. The building or erection is rendered a nuisance by the act of keeping intoxicating liquors in it, with intent to sell the same contrary to law, or by the unlawful sale there of such liquors. And it is not doubted that it may be rendered a nuisance by the unauthorized act of the agent or servant of the proprietor or owner in selling intoxicating liquors in it contrary to law, when the motives and intentions of the proprietor are all lawful. But by the other provision the owner or proprietor is subjected to the punishment prescribed by law for the crime of nuisance, when he uses or occupies the building or place "for any of the purposes prohibited in said sections;" that is, he is guilty of the offenses if he uses or occupies the place for the purpose of keeping

Grant v. Parsons et al.

intoxicating liquors with intent to sell the same contrary to law, or if he occupies it for the purpose of selling such liquors contrary to law. Now, it cannot be said that he occupies it for a particular purpose, unless he intends to accomplish that purpose by occupying it. He does not occupy it for the purpose of selling intoxicating liquors contrary to law unless he intends to sell such liquors unlawfully. He is not, therefore, guilty of the crime of nuisance on account of the unlawful sales of liquor in his store by his clerk, unless he occupies the place, or carries on the business, for the purpose of making such sales. In other words, an unlawful intent on his part is an essential ingredient of the crime.

We think, therefore, that the instruction is erroneous, and the judgment is accordingly

REVERSED.

GRANT V. PARSONS ET AL.

1. **Mortgage: ON LAND INCLUDING HOMESTEAD: FORECLOSURE: RIGHT OF JUNIOR MORTGAGEE TO ASSIGNMENT: CODE, § 3323.** Plaintiff began an action to foreclose her senior mortgage on two hundred and forty acres of land, of which forty acres were the homestead. A junior mortgagee, whose mortgage covered all the land but the homestead, was made defendant, and he brought into court the money to pay off the senior mortgage, and demanded an assignment thereof to himself, under section 3323 of the Code. *Held* that he was entitled to an assignment of the senior mortgage only as to the land not included in the homestead. Since the homestead could be sold under the senior mortgage only after exhausting the other land, (Code, § 1993,) and could in no case be subjected to the satisfaction of the junior mortgage, an assignment of the senior mortgage as to the homestead could be of no avail in effectuating the purpose of section 3323.

Appeal from Clark District Court.

FRIDAY, SEPTEMBER 25.

PLAINTIFF brought this action on two promissory notes

executed by the defendants L. L. Parsons and O. F. Parsons, and to foreclose a mortgage given by them to secure said notes. D. S. Sigler was made a party defendant, and it was alleged in the petition that he asserted some interest in the mortgaged premises, but that such interest was junior to plaintiff's mortgage. He answered, alleging that he was the owner of a mortgage given by the defendants L. L. Parsons and O. F. Parsons to Twining Bros., and that the same was a lien on the premises covered by plaintiff's mortgage, but was junior to it; and he alleged that he was ready and willing to pay the amount of the debt secured by plaintiff's mortgage, and he brought into court the amount of money required for such payment, and he demanded the assignment to him of all plaintiff's interest under her mortgage. This demand was resisted by plaintiff, and by the defendants L. L. Parsons and O. F. Parsons, and by George W. Frank and Darrow, who intervened in the cause and set up a claim to a portion of the mortgaged property, on the ground that plaintiff's mortgage covered the homestead of the mortgagors, and that defendant had no lien under his mortgage on such homestead, and that, before defendant made the offer to pay plaintiff's debt and take an assignment of her interest under the mortgage, she had released the homestead from the mortgage. The district court denied defendant the relief demanded, and he appeals.

Nourse & Kauffman, for appellants.

T. M. Stewart, for appellee.

REED, J.—There is no controversy as to the facts. Plaintiff's mortgage covers two hundred and forty acres of land, forty acres of which is the homestead of the mortgagors. Defendant's mortgage is junior to plaintiff's, and it covers all of the land covered by plaintiff's, except the homestead. The question is as to the extent of the interest which defendant is entitled to have assigned to him upon the payment by

him of the amount of the debt secured by plaintiff's mortgage. His claim is that under Code, § 3323, he is entitled to have the whole of the interest of plaintiff under her mortgage assigned to him. That section is as follows: "At any time prior to the sale, a person having a lien on the property, which is junior to the mortgage, will be entitled to an assignment of all the interest of the holder of the mortgage, by paying the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his own. He may proceed with the foreclosure, or discontinue, it at his option."

If the language of this section is to be taken literally, defendant's claim could not well be denied. However, in determining what rights accrue under it on the present state of facts, it should be construed in connection with such other legislation as may relate to the same subject-matter. The manifest object of the section is to secure to the junior lienholder the right to protect his lien by buying in the paramount incumbrance, and it should be so construed, if possible, as to effectuate that object. If the junior lien attaches to but a portion of the property covered by the senior mortgage, and all portions of it are subject to be sold alike for the satisfaction of the debt secured by that mortgage, the junior lienholder would undoubtedly be entitled, under the statute, upon the payment of the amount of the debt, to an assignment of all the interest of the holder of the mortgage. For in that case he would have the right, first, to apply the portion of the property covered by the senior mortgage alone to the satisfaction of the debt secured by that mortgage, and afterwards to appropriate the property covered by the junior lien, or the portion of it remaining after the satisfaction of the debt secured by the senior mortgage, to the satisfaction of the debt secured by that lien. But in this case, the portion of the property to which the junior lien did not attach is the homestead of the mortgagors, and it can be sold under the senior mortgage only to supply the deficiency remaining

after exhausting the other property covered by that mortgage. Code, § 1993. And if the homestead should sell for an amount in excess of such deficiency, the amount remaining could not be appropriated in satisfaction of the debt secured by defendant's junior mortgage, but would be held by the mortgagors exempt from that debt, so that defendant could not be benefited by the assignment to him of the interest of the plaintiff under her mortgage in the homestead. There is no possible way in which that interest can be made available for either the protection or satisfaction of his junior lien, and the only interest held by plaintiff by virtue of her mortgage, which in any event can be appropriated to the satisfaction of the junior lien, is her interest in the other property.

We think, therefore, that the district court did not err in refusing to direct plaintiff to assign to him her interest in the homestead. The judgment, however, denies him any relief. He is clearly entitled, if he shall elect to accept it, to an assignment of the interest of plaintiff in the property other than the homestead, and the judgment will be so modified as to secure that right to him. In the view we have taken of the rights of the parties under the statutes quoted above, it is unnecessary to determine whether there was a release by plaintiff of the mortgage on the homestead. But the costs of the appeal will be taxed to the appellant.

MODIFIED AND AFFIRMED.

VAN ORSDAL V. VAN ORSDAL.

07 35
92 436

1. **Divorce in Sister State: VALIDITY OF IN IOWA.** Where the laws of a sister state relating to the subject of divorce are substantially like those of this state, a decree of divorce regularly obtained in such state will be regarded as valid in this state.
2. —: **SUBSEQUENT ACTION FOR ALIMONY IN IOWA.** Where a husband has procured a valid divorce from his wife in a sister state, if it be admitted that the wife, always a resident of this state, might subsequently maintain an action for alimony out of property found in this state, the rule could apply only to property which the husband owned at the time of the divorce, and not to what he subsequently acquired.

Appeal from Henry Circuit Court.

FRIDAY, SEPTEMBER 25.

ACTION for a divorce and alimony. The defendant pleaded that in May, 1880, he was granted a divorce from the plaintiff by a court of competent jurisdiction in the state of Nebraska, of which state he was then, and for some time prior thereto, had been a resident. In an amendment to her petition, the defendant pleaded that the divorce was fraudulently obtained, and that it was void because the Nebraska court had no jurisdiction over her when the decree granting the divorce was rendered. The court found that the plaintiff was entitled to a divorce and alimony, and a decree was accordingly entered. The defendant appeals.

Woolson & Babb, for appellant.

L. G. & L. A. Palmer, for appellee.

SEEVERS, J.—I. The parties were married in this state in 1878, and the plaintiff has at all times since then been a resident of this state. On the same day the marriage took place the defendant left Iowa and became a resident of Nebraska, and in May,

1. DIVORCE IN
sister state:
validity of in
Iowa.

 Van Orsdal v. Van Orsdal.

1880, he obtained a divorce from the plaintiff in that state. Notice of the application of such divorce was personally served on the plaintiff in this state, but she failed to appear or make any defense. There is no sufficient evidence that such divorce was obtained by fraud, and it is deemed sufficient to say, without referring to the evidence, that the decree of divorce granted in Nebraska must be recognized as valid in that state. Counsel for the appellee do not claim otherwise. Their contention is that, although the divorce granted in Nebraska may be valid in that state, yet it is invalid in Iowa, and this is the material question to be determined. The policy and laws of the two states are substantially the same as to the mode of procedure that may be adopted to obtain a divorce; that is to say, it is provided by statute in both states that a divorce may be obtained by a resident from a non-resident by service of a notice by publication, or by a personal service on the defendant in some other state or country. This being so, what effect should be given to the Nebraska divorce in the courts of this state? This has been a fruitful subject of discussion by the text writers, and in the courts of this country. It will be conceded that the authorities are not entirely in accord. The whole subject has been exhaustively discussed in text-books, and by judges of learning and ability. We therefore do not deem it necessary to state any reasons in support of the conclusion reached, which is, that as the divorce granted in Nebraska is valid there, it must be regarded as valid here. In support of this conclusion we refer to chapter 92, Bish. Mar. & Div., and authorities cited in notes.

II. Counsel for appellee insist that, notwithstanding the Nebraska divorce is valid, yet the plaintiff may be awarded alimony in this state out of property found here. Conceding this to be true and applicable in a certain class of cases, we feel sure that the rule cannot apply to the case at bar. The divorce was granted, as has been said, in May, 1880. In November, 1881, the

2. ———: sub-sequent action for alimony in Iowa.

HUTCHINSON v. The Board of Equalization of the City of Oskaloosa.

defendant's father died in this state, possessed of certain property, which the defendant inherited. Now, while it may be that the plaintiff might be entitled to alimony if the defendant had owned property in the state at the time the divorce was procured in Nebraska, she cannot be so entitled because he has subsequently acquired property. The plaintiff, if entitled to alimony, was so entitled at the time the divorce was granted. The relation of husband and wife then ceased, and neither party is entitled to any share of or interest in property which may be subsequently acquired.

The judgment of the circuit court is reversed, and the case remanded to that court with directions to dismiss the petition, or the defendant at his option may have a decree in this court.

REVERSED.

HUTCHINSON v. THE BOARD OF EQUALIZATION OF THE CITY OF
OSKALOOSA.

1. **Taxation: EQUALIZING ASSESSMENT: EVIDENCE CONSIDERED.** The defendant raised plaintiff's personal assessment from \$440 to \$10,440, and assessed him as agent in the sum of \$20,000, but, on appeal to the circuit court, his personal assessment was reduced to \$440, and his assessment as agent was stricken out. Upon consideration of the evidence, (see opinion,) *held* that the judgment of the circuit court was just and right.

Appeal from Mahaska Circuit Court.

FRIDAY, SEPTEMBER 25.

THE plaintiff was assessed upon his moneys and credits at \$440. The board of equalization in the city in which he resides, to-wit, the city of Oskaloosa, raised his assessment from \$440 to \$10,440, and, in addition thereto, assessed him as agent of the Colonial & United States Mortgage Company

Hutchinson v. The Board of Equalization of the City of Oskaloosa.

in the sum of \$20,000. The plaintiff, feeling aggrieved by the action of the board, appealed therefrom to the circuit court of Mahaska county. Upon hearing, the court reversed the action of the board by reducing his individual assessment to \$440, as it stood originally, and by striking out altogether his assessment as agent. From the order of the circuit court the defendant appeals.

James A. Rice and *L. C. Blanchard*, for appellant.

John O. Malcom and *J. F. Lacey*, for appellee.

ADAMS, J.—The assessment in question is that of 1883. The defendant claims, as we understand, that the plaintiff's own testimony shows that his individual assessments ought not to have been reduced, but should have been even more than the amount to which it was raised by the board. But we think otherwise. The plaintiff testified that his moneys and credits amounted to \$10,000, but that his indebtedness amounted to \$29,900. Taking this statement to be correct, there was, of course, nothing in the action of the circuit court of which the defendant could properly complain. But the defendant claims that it is not correct, as shown by other testimony of the plaintiff. The indebtedness for which the plaintiff claims a deduction arose by reason of promissory notes given to Henry and Deborah Hutchinson, of England. The defendant claims that this indebtedness is a fiction, and that the real fact is that, while he may have received money from these persons, to whom he says he was indebted, he received it as their agent, and does not owe them the money. But in our opinion the evidence shows otherwise. It may be that he had theretofore received their money as agent, and perhaps the identical money in question, but he might in good faith borrow it, and we see nothing in the evidence which shows that the claimed indebtedness is not a real one.

It is said, however, conceding that he owed Henry and

Deborah Hutchinson the amount claimed, that there should have been no reduction of his assessment, because the evidence shows that he had from them a much larger amount than \$10,000, which, if borrowed, became moneys or credits in his hands, and so the amount of \$10,000 testified to by him as his moneys and credits was too small. But it may be that a part was received as agent, and, if so, he was not assessable with the same as his own. Whether he was assessable with the same as agent, we need not determine. He was not so assessed, and no question of that kind is before us.

We come next to consider whether the court erred in striking but the \$20,000 as the assessment of the plaintiff as agent of the Colonial & United States Mortgage Company. This assessment appears to have been made on account of a loan of money, amounting to \$50,000, made upon the note and mortgage of one Nathan Towne. The loan was made in February, 1882, by the plaintiff from his own money; and the Colonial & United States Mortgage Company became the owner of the note and mortgage in April of that year. Who owned them on the first day of January, 1883, does not appear, nor is it material. There is no evidence that the plaintiff sustained any such relation to them that he was assessable on account thereof as the agent of the Colonial & United States Mortgage Company.

We see no error in the ruling of the circuit court, and the judgment must be

AFFIRMED.

SHEA V. THE CITY OF OTTUMWA.

1. **Cities and Towns: DEDICATION OF STREET: UNACKNOWLEDGED PLAT: SALE OF LOTS: ANIMUS DEDICANDI.** Where the proprietors of an addition to the defendant city made and had recorded a plat of the addition, but the same was not acknowledged as required by law, and they sold and conveyed lots bounded according to the descriptions in the plat, *held* that proof of these facts was sufficient to establish the inten-

67	39
109	431
67	39
116	710
67	39
118	297
67	39
120	79
67	39
124	524
67	39
127	660
67	39
130	602
67	39
134	433
67	39
144	356
144	356
144	545

Shea v. The City of Ottumwa.

tion of the proprietors to dedicate to public use the streets shown by the plat, notwithstanding it was not acknowledged.

2. —: LOSS OF STREET BY NON-USER: FACTS NOT AMOUNTING TO. Where land in a city was dedicated to public use for a street, but it was rough and hilly, and was needed and used by the public but little for thirty years, when the city proceeded to grade it, *held* that the delay in improving it did not cause it to revert to the dedicator.

Appeal from Wapello District Court.

FRIDAY, SEPTEMBER 25. .

ACTION in chancery to quiet the title to certain lands, and to recover damages for entering upon and grading a street thereon. A decree was entered for defendant, declaring the land to be a part of the street. Plaintiff appeals.

John F. Lacey, P. H. Riordan and Sloan, Work & Brown, for appellant.

Charles Hill and McNett & Tisdale, for appellee.

BECK, CH. J.—I. The plaintiff in her original petition claims title to the land in controversy under possession for a time longer than the period prescribed by the statute to bar actions to recover lands, alleging that she has acquired title by "prescription." In an amended petition, she claims title under conveyances from the original owners, as well as by "prescription." But the conveyance to her, as shown by the evidence, was executed after this suit was commenced. The defendant claims that the land is a part of the street, as shown by the plats of the city, and thereby the land in controversy was dedicated as a street to public use.

II. It would be difficult, if not impossible, to present the facts in issue involved in the question of the existence of a street upon the land, without presenting the maps or plats of the city dividing the property into town lots, and dedicating the streets to public use. This is not necessary in order to announce our decision of the case, and, if done, it would serve

1. CITIES and towns: dedication of street: unacknowledged plat: sale of lots: animus dedicandi.

no useful purpose in aiding to express or illustrate principles of law. It is sufficient to say that the land in dispute is shown to be a part of the street by an amended or supplemental plat made and filed for record after the original plat of the city was recorded. But it is objected to this plat that it was not acknowledged as required by law. We do not think plaintiff is benefited by the defect. We think that the existence of the plat, and the sales of lots, bounded according to the description of the plat, by the person platting the land, which is shown by the record, would establish the *animus dedicandi*, which, when shown, is sufficient to establish a way or street, even if there be no record thereof made in the form prescribed by law.

III. But it is urged that there was no acceptance of the dedication by the public, or by the city for the public, for more than thirty years after the dedication, when the street was graded. It is shown that the street remained uninclosed, that the land was rough and hilly; and for that reason it was used but little by the public. It appears that, when the wants of the public demanded it, the city proceeded to grade the street at the point in dispute. It would not do to hold that city streets, dedicated to the public over hilly, rough land would revert to the dedicator if they were not improved and used by the public until the wants of the public travel demand it. In some of the cities of this state there are streets in some portions thereof over which no vehicle nor even horseman has passed, and yet they were dedicated more than thirty years ago. They have not been used for the reason that, until graded, they are incapable of use. The dedication will be presumed by the law to have contemplated this state of things, and imposed no condition upon the public to use the street until the public wants demanded and secured their improvement.

The plaintiff has failed to show that she has held such possession of the land as would bar the right of the public acquired under dedication. We think, therefore, that the city,

2. — : loss
of street by
non-user:
facts not
amounting to.

Freese & Ferguson v. The Co-operative Coal Co. et al.

in grading the street thirty years after the dedication, was not too late in accepting it.

These views and conclusions as to the facts, in our opinion, are decisive of the case, and dispose of the controlling questions therein. The decree of district court is

AFFIRMED.

FREESE & FERGUSON V. THE CO-OPERATIVE COAL CO.,
DEFENDANT, AND ANOTHER, GARNISHEE.

1. **Garnishment: REPLY TO ANSWER OF GARNISHEE: ISSUES LIMITED BY.** While it may be that a formal reply to the answer of a garnishee is not necessary in order to enable a plaintiff to dispute by evidence its truthfulness, yet, if plaintiff does file a reply setting up the facts upon which he bases his denial of the answer, the issues are limited thereby; and it was error in such a case for the court to present to the jury an issue of fraud not pleaded.

Appeal from Appanoose Circuit Court.

FRIDAY, SEPTEMBER 25.

THE plaintiff, in an action by attachment against the defendant, the Co-operative Coal Company, caused Silkmitter to be served with process of garnishment. He answered, denying indebtedness to defendant. The plaintiff filed an answer to the garnishee's answer, denying its allegations, and averring that the garnishee does owe the defendant, and has money and property in his hands belonging to defendant. In this answer it is alleged that the coal mine and appurtenances belong to defendant. The garnishee replied to the answer, denying, in general terms, the allegations thereof. The cause as to the garnishee was tried to a jury, and a verdict had for plaintiff, upon which a judgment was rendered. The garnishee appeals.

George D. Porter, for appellant.

Tannehill & Fee, for appellees.

BECK, CH. J.—I. Plaintiffs claim that the garnishee is indebted to defendant on account of certain transactions connected with the lease of coal lands and the subsequent surrender of the lease to the garnishee. It appears that he leased the land to the defendant, or its stockholders, prior to its incorporation, for a certain royalty per bushel on all coal mined under the lease. This royalty being in arrear, the defendant surrendered the lease, and transferred all improvements it had put upon the land to the garnishee in satisfaction of the sum due for royalty. This is the garnishee's version of the transaction.

II. The plaintiffs claim, as it appears from their answer, that the coal mine, or rather the lease thereof, and the improvements made by defendant, are still its property, and that whatever possession the garnishee holds is as of property of defendant. It is not alleged in any pleadings of plaintiffs that the surrender of the lease and transfer of the property by defendant to the garnishee were fraudulently made. And, indeed, it does not appear that the case was tried in view of such an issue. The plaintiffs surely did not put in issue the good faith of the surrender of the lease and the transfer of the other property, by simply alleging that the property belonged to defendant. This is all that the answer amounts to.

III. The circuit court directed the jury to determine the good faith of the garnishee's transactions, and gave instructions enabling the jury to determine whether they were or were not fraudulent. We think these instructions should not have been given, for the reason that no issue of fraud was presented by the pleadings. It is possible that formal pleadings are not necessary in reply to the answer of a garnishee in order to enable a plaintiff to dispute by evidence

Bedwell et al. v. Gephart.

its truthfulness. But it cannot be doubted that, when the plaintiff does file an answer setting up the facts upon which he bases the denial of the garnishee's answer, thus presenting an issue of fact, he cannot depart therefrom and ask recovery upon grounds not pleaded.

It is our conclusion that in the instructions above referred to the court erred. Other questions discussed by counsel need not be considered.

REVERSED.

BEDWELL, ET AL. V. GEPHART.

1. **Surety: ON RESTITUTION BOND IN ATTACHMENT: DISCHARGE OF BY CREDITOR'S RELEASE OF PRINCIPAL DEBTOR'S PROPERTY: LIMITATION OF THE RULE.** The relinquishment by the creditor, without the consent of the surety, of any hold which he has actually acquired on the property of the principal debtor operates to discharge the surety to the extent of the value of the property so relinquished. (See authorities cited in opinion.) But where the creditor's hold on the property is of doubtful validity, and it is relinquished by way of a compromise made in good faith, and the proceeds of the compromise are applied in discharge of the debt *pro tanto*, the surety will not be discharged in the absence of a showing that an attempt to subject the property would have resulted more favorably, even though it subsequently appear that, by evidence not before available, the property was equitably liable for the payment of the debt.
2. ———: ———: **MOTION FOR JUDGMENT AGAINST: DEFENSE NOT PLEADED FOREVER BARRED.** Where sureties in a restitution bond in attachment are called into court upon a motion for judgment against them on the bond, and they wish to avail themselves of the fact that the creditor has relinquished property of the principal debtor which was subject to be sold in discharge of the debt, they must then plead such defense, and, if they fail so to do, they cannot afterwards be heard to claim a credit on the judgment to the extent of the value of the property so relinquished. See authorities cited in opinion.

Appeal from Wapello Circuit Court.

SATURDAY, SEPTEMBER 26.

ACTION in equity to establish a credit on a judgment

67	44
d140	393
141	182
67	44
143	736

obtained by defendant against plaintiffs. The material facts are stated in the opinion. The court dismissed the petition, and plaintiffs appeal.

W. W. Cory and *H. B. Hendershott*, for appellants.

Stiles & Beaman, for appellee.

REED, J.—On the nineteenth day of August, 1875, defendant, Gephart, commenced an action in the circuit court against one J. O. Briscoe on a money demand. A writ of attachment was issued in the cause, and was levied on a number of lots in the city of Ottumwa. A second attachment was subsequently issued in the case, on which certain personal property was seized. To secure the release of this property, Briscoe filed two bonds conditioned that he would perform any judgment which might be rendered against him in the further progress of the action. One of these bonds was in the penalty of \$1,000, and plaintiff Bedwell was surety thereon. The penalty of the other bond was \$450, and plaintiff Greenlee was surety on it. Judgment was rendered in said cause on the eighteenth day of November, 1878, against said Briscoe for \$1,558.97 damages and \$158.09 costs. At a subsequent term of the court, Gephart filed a motion for judgment against the sureties on said bonds. They were served with notice of this motion, and appeared, and resisted it on grounds that need not here be stated. The result of the proceeding was that judgment was entered against each for the amount of the penalty of the bond on which he was surety. These judgments were rendered on the sixth day of July, 1880. The title to the lots on which the first writ of attachment was levied was held by Mary A. Briscoe, the wife of J. O. Briscoe. Gephart instituted an action in equity to subject this property to the payment of his debt, alleging in his petition that it belonged, in fact, to J. O. Briscoe, and had been purchased with his means, and that he had procured the title to it to be conveyed to his wife

1. SURETY : on
restitution
bond in
attachment :
discharge of
by creditor's
release of
principal deb-
tor's property :
limitation of
the rule.

for the purpose of placing it beyond the reach of his creditors. The Briscoes answered this petition, denying its allegations. This equitable action was pending when the second writ of attachment was issued, and when plaintiffs signed the bonds on which the judgments against them were rendered. The Briscoes had an opportunity to sell one of the attached lots on what they regarded as favorable terms, and they proposed to Gephart that if he would release said lot from the attachment, and permit the purchaser to take it discharged of the lien of his attachment and judgment, they would pay him, to be applied on the judgment, a portion of the price which they would receive for it. Being advised by his counsel that it was doubtful whether the claim set up in the equitable action could be established, he accepted the offer and gave a written release of the lot. The price at which the lot was sold was \$1,050, and \$500 of that amount was paid to Gephart. The transaction was had after the judgment was rendered against Briscoe, but before the judgments were taken against the plaintiffs. Gephart entered a credit of the amount received by him in the transaction on the judgment against Briscoe. The release of the lot was made without plaintiffs' knowledge or consent. And it is shown that the lot belonged, in fact, to J. O. Briscoe, and that the conveyance to his wife was made for the purpose of defrauding his creditors.

The relief demanded by plaintiffs in this action is that they have the benefit of a credit on the judgments against them for the full amount realized from the sale of said lot; the ground of their claim being that, as their liability on the bonds was that of sureties, they were entitled to the benefit of all securities which came into the hands of the creditor; and as, by the discharge of a portion of the value of said lot from the lien of the attachment levy and judgment, he deprived them of the benefits of that amount of the security held by him, they are now entitled to be discharged *pro tanto*. The law is well settled that the relinquishment by the creditor, without the consent of the surety, of any hold which he has actually

acquired on the property of the principal debtor operates to discharge the surety to the extent of the value of the interest so relinquished. The release of real estate from the lien of a judgment, or the discharge of a levy whereby a lien on property has been created, will have this effect. *Chambers v. Cochran*, 18 Iowa, 159; *Sherraden v. Parker*, 24 Id., 28; *Rogers v. School Trustees*, 46 Ill., 431; *Ferguson v. Turner*, 7 Mo., 497; *Kuhns v. Westmoreland Bank*, 2 Watts, 136; *Com. v. Vanderslice*, 8 Serg. & R., 552; *Farmers' Bank v. Reynolds*, 13 Ohio, 84.

The question in the present case is whether it is brought by the facts within this well-settled rule. We think it is not. The interest which defendant surrendered in the property was given up in the compromise of a doubtful claim. The parties are now able to show that he had acquired a lien upon the property by the attachment levy and judgment, and that it could have been subjected to sale in satisfaction of the judgment. But, in the light of the facts then known to defendant and his counsel, it was reasonably doubtful whether any such interest had been acquired in it, and he elected to accept the certain and substantial advantages which were acquired by the compromise in satisfaction of the doubtful claim which he had been asserting to the property. It cannot be said, we think, that plaintiffs have suffered any detriment from the compromise or the release of the property thereunder. The surety has the right to demand that the securities in the hands of the creditor be either applied to the satisfaction of the debt, or that they be preserved for his indemnity in case he is compelled to pay it. The application of the fair value of the security to the satisfaction of the debt secures to him the very benefit to which, under the law, he is entitled. As stated above, defendant has credited the full amount received by him for the discharge of the lot on the judgment against Briscoe. Plaintiffs have the benefit of this credit. It is not shown that this sum was not, considering the circumstances of the case, the fair value of the security held by defend-

ant. The property was sold, it is true, for a greater amount; but it is by no means clear that anything could have been realized out of it for the satisfaction of the debt in any other way.

Plaintiffs were able to establish on the trial of this cause, by the testimony of Briscoe, that he was the owner of the property, and that he had procured it to be conveyed to his wife for the purpose of placing it beyond the reach of his creditors. His testimony, however, was given after the property had been released and disposed of, and when all motive for concealment or falsehood was at an end; but it is not at all certain that the same facts could have been proven by him in a proceeding to subject the property to the payment of the debt; for, during the pendency of the equitable action brought by defendant to uncover it, he constantly denied that he had any interest in it, and it is not shown that any facts tending to impeach the conveyance to Mary A. Briscoe could have been established by the testimony of other witnesses. It does not appear, therefore, that plaintiffs would have derived any greater advantage from the prosecution, either by defendant or themselves, of the proceeding to subject the property to the judgment than they have derived from the compromise, and they cannot recover in the absence of any showing that they were damaged by the release of the property.

II. There is another ground, however, which is equally conclusive against plaintiffs' right to recover. As stated above, a. —: —: motion for judgment against: defense not pleaded for: ever barred. the transaction in which the property was released took place before the judgments against them were rendered. If they were discharged by the release of the property, that fact could have been shown in resistance of the motion. Their discharge constituted a defense in their favor to the claim which defendant was seeking to establish against them. There was nothing in the character of the proceedings which prevented them from making their defense. It was as available to them as it would have been if the proceedings had been an action on the bond,

Clapp v. Forster et al.

instead of a motion for judgment. Any defense which would have been available in the one character of proceeding was equally so in that which was adopted. Having failed to make the defense when they had the opportunity, it is no longer available to them. They are estopped by the judgment. *Dewey v. Peck*, 33 Iowa, 242; *Doyle v. Reilly*, 18 Id., 108; *Lawrence Savings Bank v. Stevens*, 46 Id., 429.

AFFIRMED.

CLAPP V. FORSTER ET AL.

1. **Gift of Real Estate: ORAL RESERVATION OF EASEMENT: CONVEYANCE WITHOUT RESERVATION: SUBSEQUENT RECONVEYANCE OF EASEMENT: CONSIDERATION FOR RECONVEYANCE: EVIDENCE.** A father gave to his children certain real estate, orally reserving an easement, but he conveyed it by deeds of warranty without reserving the easement. Some years afterwards the children conveyed back the easement. *Held* that the conveyance and the reconveyance were together the written expression of the original agreement, and that the reconveyance was no less binding because made at a later date, and that, to show the consideration for it, parol testimony of the original agreement was competent.

Appeal from Polk Circuit Court.

SATURDAY, SEPTEMBER 26.

THIS is an action in equity by which the plaintiff seeks to enjoin the defendants from erecting any building or other structures upon certain parts of two lots in the city of Des Moines. There was a trial to the court, and a decree for the plaintiff. The defendants appeal.

Phillips & Day and *Macy & Sweeney*, for appellants.

Mitchell & Dudley and *Nourse & Kauffman*, for appellee.

Clapp v. Forster et al.

ROTHROCK, J.—In the year 1869 the plaintiff was the owner of lots 7 and 8, in block 14, in the city of Des Moines. These lots are the quarter of the block, and are bounded on the north by Walnut street, on the east by Fifth street, and on the west and south by alleys. In the year 1871 the plaintiff was about to erect a block of buildings upon the east end of said lots, with a frontage of forty-eight feet on Walnut street, and extending south and along Fifth street to the alley. He was then a widower and about to be married, and before that event he desired to make certain gifts to his children. He had three daughters, one of whom had married A. M. Forster, one of the defendants herein. In pursuance of this design, he conveyed to his daughter Mrs. Forster the twenty-two feet in width of said lots next to the forty-eight feet on which he purposed erecting his block of buildings. To another daughter he conveyed the next twenty-two feet, and to the other the next twenty-two feet. These conveyances were all made by deeds, with covenants of general warranty, without any reservation. Before making the conveyances, however, he called his family together, and explained to them how he intended to improve the east forty-eight feet of the lots, and it was agreed and fully understood by Mrs. Forster and the other daughters that they should not erect any buildings or structures on the parts of the lots conveyed to them which would extend more than eighty feet south from Walnut street, and that the balance of the parts of lots so conveyed should remain open as an area or court; that it was agreed that an area or court of sixty-six feet east and west, by forty-eight feet north and south, should remain open, and not be built upon by Mrs. Forster and the other daughters. The plaintiff proceeded to erect his block of buildings of the dimensions above described. The defendant Forster, at the same time, and using a common partition wall, erected a building on the twenty-two feet conveyed to his wife. His building was twenty-two feet front on Walnut street, and eighty feet deep. The plaintiff, in erecting his

block, made an area to his basement which extended into the twenty-two feet which he had conveyed to his daughter Mrs. Forster, and back of the eighty feet occupied by Forster's building. He put windows and openings in his block opposite the vacant part of the lots conveyed to his children. He had access to the basement of his building through and over the said area, and by way of which he supplies his steam heater in the basement with fuel. In 1874 the daughters of the plaintiff executed and delivered to him the following instrument in writing, which was duly acknowledged and recorded:

"This article of indenture, made and entered into by and between Ida Clapp, Ella White and W. L. White, her husband, Helen M. Forster and A. M. Forster, her husband, and E. R. Clapp, all of the city of Des Moines, Iowa:

"Witnesses, that whereas, said E. R. Clapp did, on or about the fifteenth day of April, A. D. 1871, in consideration of love and affection for his daughters, Ida Clapp, Ella White and Helen M. Forster, execute to each a deed for certain premises situated in Polk county, Iowa, to-wit: To said Ida Clapp the east half ($\frac{1}{2}$) of west forty-four (44) feet of lots seven (7) and eight (8) in block fourteen (14) in the original town of Fort Des Moines, now included in the corporate limits of the city of Des Moines, Iowa; to said Ella White the east one-third ($\frac{1}{3}$) of the west sixty-six (66) feet of the lots and block above described; to said Helen M. Forster the west twenty-two (22) feet of the east sixty-six (66) feet of the lots and blocks above described; thereby intending said above described premises as a gift to each of the said daughters, as hereinbefore set out. And whereas, upon the north eighty-four (84) feet of each of the above described premises a brick building has been erected, leaving thereby the south forty-eight (48) feet of each of the above described portions of the said lots vacant and unoccupied, and said unoccupied portions of said premises making and constituting an area sixty-six (66) by forty-eight (48) feet in the rear of said buildings, upon the south side of said lot seven, (7,) and whereas,

Clapp v. Forster et al.

it is for the mutual benefit of each of the parties named herein that said area should be and remain open and unoccupied for the purpose of providing said buildings with light and air, and for the convenient and comfortable use thereof:

"Therefore, know all men by these presents, that we, Ida Clapp and Ella White and W. L. White, her husband, Helen M. Forster and A. M. Forster, her husband, in consideration of the gift heretofore made by the said E. R. Clapp, and the further consideration of the mutual benefit, use and accommodation to the owners and occupants of the hereinbefore described buildings, do hereby covenant and agree with the said E. R. Clapp, and with each other, and we do hereby bind ourselves, our heirs, executors and assigns firmly by these presents, upon a penalty of a forfeiture of all our rights, and the rights of each of us, in and to the premises hereinbefore described, by reason of the gift of said E. R. Clapp, in case of a violation of this agreement, and the same shall at once revert to the said E. R. Clapp, to preserve and maintain free and clear of all obstructions or buildings, or by any extension of those hereinbefore described, upon the vacant portions of said lot seven, (7,) the area in the rear of said buildings, except upon a written consent of all the parties hereto first had and obtained.

"Witness our hands, etc., July 31, 1874.

[Signed]

"IDA CLAPP,

"MRS. ELLA WHITE,

"W. L. WHITE,

"MRS. HELEN M. FORSTER,

"A. M. FORSTER.

Sometime after the execution of this instrument Helen M. Forster died intestate, and A. M. Forster, as her surviving husband, inherited one-third of her property, and E. M. Forster, his only child, inherited two-thirds. In 1883 the plaintiff's block and the building owned by the defendants were nearly destroyed by fire, and they were rebuilt. Some disagreement arose between the parties as to the openings

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between the buildings, and some changes were made not necessary to be stated here. The plaintiff, however, reconstructed his block, so far as it adjoined the area, with an entrance to his basement as before, and with windows looking out upon the area, and from which the rear part of his block is lighted. Forster commenced an excavation for a building which would close up the area adjoining plaintiff's block, and this action is to enjoin the defendants from in any manner interfering with or obstructing said area.

The main question in the case, and, indeed, the question which we think is decisive of the rights of the parties, is whether the written instrument executed to the plaintiff by his daughters in 1874 was and is binding upon them; and we will dispose of that question without much elaboration, because, in our opinion, it is plain and easy of solution. Some question is made to the effect that the plaintiff did not sign the instrument, and that he is not properly a party thereto. It seems to us that a mere reading of the instrument is a sufficient refutation of this claim. The agreement is an express covenant with the plaintiff that the area shall remain vacant and unoccupied. There is no more necessity that plaintiff should have signed it than that he should have signed a deed if his daughters had conveyed the lots to him. It is further claimed that the instrument is void for want of a consideration, and that the parol agreement made before the deeds were executed cannot be shown to contradict the deeds or to ingraft thereon reservations not contained therein. This would probably be correct if it were not for the writing executed by the grantees in the deeds. It is this writing which creates the reservation. Suppose that the deeds and this instrument in writing had been made and delivered at the same time; there would be no question about the consideration. They would be but parts of the same transaction. What difference does it make in the rights of the parties if one is made three or four years after the other? We cannot see that the rights of the parties are other and

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McAndrew v. Madison County.

different if the two instruments are shown to be parts of the same transaction. The parol evidence was competent for the purpose of showing that the conveyance back of the easement was in pursuance of a previous arrangement between the parties, and therefore a part of the one transaction, which was the gift of property from a father to his children.

We think the decree of the circuit court should be

AFFIRMED.

McANDREW V. MADISON COUNTY.

1. **Bastardy Proceedings: NOT CRIMINAL IN CHARACTER: COUNTY NOT LIABLE FOR COSTS.** Proceedings brought under title 25. chap. 56, of the Code, by the mother of a bastard child against the putative father, to charge him with the support of the child, are not criminal in their nature, though brought in the name of the state, and the county is not liable for the costs in such a case, under the provisions of Code, § 3790.

Appeal from Madison District Court.

SATURDAY, SEPTEMBER 26.

THE plaintiff is sheriff of Madison county. He claims of said county, by this action, the sum of \$131; the same being for sheriff's fees for serving subpoenas in an action wherein the state of Iowa was plaintiff and one Cook was defendant. The cause was submitted to the district court upon an agreed statement of facts, and judgment was rendered for the plaintiff. Defendant appeals.

V. Wainwright, for appellant.

C. C. Goodale, for appellee.

ROTHROCK, J.—It appears from the agreed statement of

McAndrew v. Madison County.

facts that the proceeding in which the fees arose was entitled *State of Iowa v. Frank E. Cook*, and was brought and prosecuted for the purpose of charging the defendant with the support of an illegitimate child, of which he was alleged to be the father. The accusation was tried to a jury, and there was a verdict of not guilty. The proceeding was commenced by the mother of the child, and was prosecuted by attorneys employed by her. The district attorney did not authorize the proceeding to be commenced, and had no knowledge that there was such an action until after the complaint was filed, when his attention was called to the fact. Afterwards, and at the term of court at which the cause was tried, the district attorney asked to be relieved from assisting in the trial, which was acceded to by counsel for complainant, who tried and managed the case upon the part of the plaintiff.

By section 3790 of the Code, it is provided that "in all criminal cases where the prosecution fails, or when the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice, as far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury."

An action under the bastardy act (Code, tit. 25, chap. 56) is a civil action. It is true, it is required to be entitled in the name of the state against the accused as defendant. But the defendant is brought into court by notice, as in an ordinary action, and it is required to be tried as an ordinary action. It may be brought by any person; and the district attorney is required to prosecute the cause in behalf of the complainant. A verdict of guilty is not followed by fine or imprisonment, as in a criminal case. The judgment is merely for the payment of money. It is very plain that the county is not liable for costs under section 3790 of the Code, for the simple reason that the proceeding is not a "criminal case."

But it is claimed that the county is liable for costs because it is a party in interest in the prosecution of the cause. There

McAndrew v. Madison County.

might be some plausibility in this claim if the present law authorized the court to require the defendant, upon being found guilty, to give a bond with security to the county to save it, and every other county in the state, from all charges towards the maintenance of the child. Revision 1860, § 1420. The present law contains no such provision, and we cannot see how the county can be held to be interested in the suit. Possibly, if there were not an express provision of the law authorizing the county to maintain an action in its own behalf, there might be some ground for claiming that the county is a party in interest when the proceeding is instituted by the mother of the child, or other person.

It is provided by sections 1332-1334 of the Code that the county may maintain an action in such cases to save itself from the support of an illegitimate pauper child. But such a proceeding is not required against the putative father before proceedings against the mother. In such case the county would be liable for costs, because it is required to be a party. It seems to us it will be time enough to charge up costs against the county when it finds it necessary to protect itself against charges for keeping paupers by a suit in its own behalf, and which its officers direct, control and manage; and there is nothing in this record showing that the child is likely to become a county charge. No official fees can be allowed, except such as are expressly authorized by law, and no person can be compelled to pay costs in civil cases except parties to actions. The claim that the county, because it may be incidentally or remotely interested in having some one declared to be the father of an illegitimate child, is such a party to the proceeding as to be properly chargeable with costs, it seems to us, cannot be sustained.

REVERSED.

MEADOWS V. THE HAWKEYE INS. CO.

87	51
114	53
87	57
124	480

1. **Practice: MOTION FOR VERDICT ON PLAINTIFF'S EVIDENCE: ADMISSION OF FACTS BY: EFFECT OF.** At the conclusion of plaintiff's testimony, defendant moved the court to direct a verdict in its favor. *Held* that by so doing it admitted all the facts which the testimony tended to prove, but that the case was not then in the same position as if the admitted facts had been established by a special finding upon a full submission; because, even though, as the evidence stood, the motion ought to have been sustained, it was clearly within the discretion of the court to permit plaintiff to introduce further testimony, omitted by mistake or inadvertance. And so, where the motion was overruled, and defendant elected to stand on such ruling, and appealed to this court, and the ruling was reversed, and a *procedendo* in the usual form was issued, *held* that a motion by defendant in the lower court for judgment in its favor, without the introduction of further evidence, was properly overruled.

Appeal from Ringgold District Court

SATURDAY, SEPTEMBER 26.

THIS is an appeal by defendant from an order of the district court overruling a motion for judgment. The material facts are stated in the opinion.

R. W. Barger, for appellant.

Henry & Spence and *Laughlin & Campbell*, for appellee.

REED, J.—Plaintiff brought this action on a policy of insurance. Defendant answered, admitting the execution of the contract but alleging that it contained a provision that the commencement of foreclosure or other proceedings upon any mortgage, lien or incumbrance of any kind, or of any suit or action in any court concerning the title in any wise, should immediately render the policy void; and that, subsequent to the execution of the policy, foreclosure proceedings were commenced on a mortgage covering the property insured. To this answer plaintiff filed a reply, in one paragraph of

which he denied its averments, and in another paragraph he admitted said allegations and pleaded certain matter in avoidance. On the trial of the issue thus formed, plaintiff introduced the policy, and certain evidence which tended to prove the destruction of the insured property, and the damages occasioned thereby, and rested. Defendant then filed a motion to direct the jury to return a verdict for it, on the ground that the facts constituting the affirmative defense pleaded in the answer were admitted by the reply, and there was no evidence tending to prove the matter pleaded in avoidance. This motion was overruled, and, defendant electing to stand on this ruling, a verdict was returned for plaintiff, and judgment rendered thereon, from which defendant appealed to this court. On the hearing of that appeal the judgment was reversed, on the ground that the court erred in overruling said motion. See *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387. Defendant then filed in this court a motion for final judgment in its favor, on the ground that, upon the facts proven in the case, it was entitled to such judgment. This motion was overruled, and *procedendo* was issued in the usual form, directing the district court to proceed in the manner required by law in harmony with the opinion of this court. When the case was again reached in the district court, counsel for plaintiff stated that they did not desire to file any amendment or additional pleading. Defendant thereupon filed a motion for judgment on the ground that by its motion to direct a verdict, filed at the former trial, it fully admitted every fact which plaintiff's evidence tended to prove, and upon those facts it was determined by the judgment of this court that plaintiff was not entitled to recover. This motion was overruled by the district court, and it is from that order that the present appeal is prosecuted.

Defendant's first position is that, by its motion to direct a verdict in its favor on the trial of the cause at the conclusion of plaintiff's evidence, it admitted every fact which the evi-

dence introduced by plaintiff tended to prove. The correctness of this position is settled by the former adjudications of this court. See *Stone v. Chicago & N. W. R. Co.*, 47 Iowa, 82; *Muldowney v. Illinois Cent. R. Co.*, 32 Id., 176; *Way v. Illinois Cent. R. Co.*, 35 Id., 585.

The next position of counsel is that by this admission the case was put in precisely the same position it would have occupied if the same facts had been established by a special finding by the court or jury after full submission, and hence the case is within the rule laid down in *Roberts v. Corbin*, 28 Iowa, 355, viz.: that "where a judgment of the district court, rendered upon a special finding of facts, is appealed to the supreme court, and there reversed on the single ground that the law as applied to the facts as thus found is with the appellant, and the cause remanded, with directions to the district court that further proceedings be had therein not inconsistent with the opinion of the supreme court, the appellant is entitled to judgment therein in the district court, and no new trial can be had."

If we were to concede counsel's premises, his conclusion would follow necessarily. We think, however, that he is wrong in his premises. The case is not in the same position as it would occupy if the admitted facts had been established by a special finding upon a full submission. The real question presented by defendant's motion to direct the jury to find for it was whether, under the reply, it was required to prove its affirmative defense before plaintiff was called upon to establish the matter pleaded in avoidance of that defense. If the court had sustained the motion and held that the facts constituting the affirmative defense were admitted by the reply, it clearly would have been within its discretion, before receiving the verdict, to have permitted plaintiff to introduce evidence to establish the matter in avoidance. It is common practice in the *nisi prius* courts to permit parties to introduce material evidence at any time before verdict, which has been omitted by mistake or inadvertence, and this practice

Christy v. Whitmore et al.

has always been approved by this court. See *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280; *Cannon v. Iowa City*, 34 Id., 203; *Crane v. Ellis*, 31 Id., 510; *Hubbell v. Ream*, Id., 289; *McNichols v. Wilson*, 42 Id., 385.

The order of this court reversing the ruling of the district court on the motion to direct a verdict placed the case in the same position it would have occupied if the district court had sustained the motion. The order appealed from will therefore be

AFFIRMED.

CHRISTY V. WHITMORE ET AL.

1. **Township Trustees: CEMETERIES: DISCRETION AS TO USE OF LAND FOR: MANDAMUS.** Although township trustees have bought land for a cemetery, they still have a discretion as to its use, and they cannot be compelled by *mandamus* to devote it to that purpose, if for any reason they deem it unsuitable.

Appeal from Van Buren Circuit Court.

SATURDAY, SEPTEMBER 26.

ACTION of *mandamus* to compel the defendants, who are township trustees, to use certain real estate as a public cemetery. The relief asked was refused and the petition dismissed. The plaintiff appeals.

Stiles & Beaman and *Lea, Wherry & Walker*, for appellant.

Sloan, Work & Brown, for appellees.

SEEVERS, J.—In addition to the usual formal allegations, the petition states that the plaintiff and one Johnson were the owners of certain described real estate situated in Bonaparte township, in Van Buren county; that, said township

being in need of additional grounds for public burial purposes, the plaintiff and Johnson sold and conveyed to the trustees of said township, and their successors in office, the described real estate, for the purpose of a public cemetery, and for no other purpose; that said real estate was needed and was suitable and proper for such purpose, and adjoined the town of Bonaparte, and was valuable for building purposes, and was worth more than the price received therefor, and would not have been sold at the price received except for such public purpose, in which the plaintiff was interested on account of other property interests, and in securing a fit and proper burial place for the dead; that the plaintiff is a taxpayer in said township, and the property was paid for with public money; that defendants have refused, although so requested, to allow the real estate so purchased to be used for the purpose aforesaid. Wherefore a peremptory writ of *mandamus* was asked to compel the defendants to permit the said real estate to be used for the purpose aforesaid.

The defendants answered the petition, and admitted that the trustees of said township proceeded to lay off the real estate into burial lots, for the purpose of disposing of the same as a cemetery, but that they were enjoined from so using it. And they further allege, for certain stated reasons, that the ground is not suitable for the said purpose. They deny that plaintiff has any such interest in the subject-matter as to entitle him to maintain the action, and say that they are invested with discretion in the premises, which cannot be controlled. No lots have been sold by the defendants for burial purposes and the real estate has not been used as a cemetery, and the defendants do not propose to use it for such purpose.

The statute provides that " the township trustees are hereby empowered to condemn or purchase, and pay for out of the general fund, and enter upon and take, any lands within the territorial limits of such township for the use of cemeteries.

* * * They shall have the power to control any such cemeteries, or appoint trustees for the same, or sell it to

any private corportion for cemetery purposes." Sections 3 and 4, Chap. 130, Acts Sixteenth General Assembly, (McClain's statutes, 96.)

It is further provided by the statute that where a duty is enjoined on a public officer, he may be compelled to perform such duty by *mandamus*; but where such officer or tribunal is invested with a discretion, their discretion cannot be controlled. Code, § 3373.

It is insisted that the land in question must be used for a cemetery, unless the evidence establishes that to so use it would create a nuisance. But we do not think this is the controlling consideration, but that, of necessity, the defendants must be invested with a discretion to so use it or not. If they become satisfied that the ground is unsuitable or inconvenient, they cannot be compelled to allow it to be so used. Until the ground has been actually so used, and deceased persons have been buried therein, the trustees have the absolute and unqualified right to exercise such discretion, and refuse to allow it to be used for such purpose. If it was a part of the consideration for the sale and purchase of the land that it should be so used, and the plaintiff has been pecuniarily damaged, it may be that he can recover such damages, or possibly he can, in a proper proceeding, have the conveyance set aside and the title reinvested in the grantors. The trustees cannot be compelled to purchase or condemn land for the purpose of a cemetery, and it is equally clear to our minds that, having done so, they cannot be compelled to use it for that purpose, if for any reason they deem it unsuitable and improper to do so. We deem it proper to say that the injunction was dissolved because the trustees declared that the land would not be so used, and also that the deed conveying the land to them is silent as to the purpose for which it was purchased.

AFFIRMED.

HERRICK V. MUSGROVE.

1. **Mortgage: QUESTION OF WIFE'S SIGNATURE: CONFLICTING EVIDENCE CONSIDERED.** In an action to foreclose a mortgage, the wife, whose name was subscribed thereto, denied that she ever executed the mortgage, and there was other evidence tending in some small degree to corroborate her. But the notary public before whom the mortgage purported to be acknowledged testified that he knew the wife, and that she did sign it in his presence. In view of the principle that instruments requiring acknowledgment before an officer ought not to be set aside without clear and satisfactory evidence, *held* that the district court was warranted in finding that the wife executed the mortgage.

Appeal from Poweshiek District Court.

SATURDAY, SEPTEMBER 26.

THIS is an action to foreclose a mortgage. There was a decree in the district court for the plaintiff. Defendant appeals.

Clark & Cheshire, for appellant.

Haines, Lyman & Howell, for appellee.

ROTHROCK, J.—The mortgage in suit purports to have been signed and acknowledged by the defendant and M. C. Musgrove, her husband, on the twelfth day of July, 1881. The acknowledgment purports to have been taken before one J. R. Pratt, a notary public, at What Cheer, Keokuk county. The defendant, by her answer, denied that she ever signed, executed, acknowledged, or delivered the mortgage, and this was the issue tried and decided in the court below, and now presented for the determination of this court. J. R. Pratt, the notary public before whom the acknowledgment purports to have been taken, testified that the husband of the defendant requested him to go to his (Musgrove's) office and take the acknowledgment of his wife; that he went there in company

67	63
122	271
67	63
141	153

with defendant's husband, and that the defendant was seated at an office table, and that she there signed the mortgage in his presence; that he knew her personally; that she looked up so that he could see her plainly, and that he could not be mistaken in her identity. The defendant testified positively that she did not sign the instrument, and she and two or three of her father's family testified that she was not at What Cheer for some days before, and for quite a number of days after, the twelfth day of July, 1881, the date of the acknowledgment; but that she was at her father's house near Montezuma. The defendant's husband made no defense, and he was not a witness in the case.

We do not attach much importance to the fact that the defendant was not at What Cheer on the twelfth day of July, 1881. The notary public did not state in his testimony that the acknowledgment was taken on that day. He testified that the dates of the mortgage and acknowledgment were filled in before the acknowledgment was taken, and that all he did was to affix his name and seal to the acknowledgment; so that the pivotal question is not whether the defendant signed and acknowledged the mortgage on the twelfth day of July, 1881, but, did she on any day, in her husband's office at What Cheer, sign it in the presence of the notary public whose seal and signature are attached to the acknowledgment? We think the certificate of the notary public, and his positive testimony, should prevail over the denial of the defendant. The mortgage was filed for record on the thirteenth day of July, 1881, and it must have been signed and acknowledged at some time before that. Certain genuine signatures of the defendant were introduced in evidence upon the trial, and they have been submitted to us for inspection. As usual in such cases, the plaintiff claims that a comparison of these signatures with the signature to the mortgage shows that all were written by the same hand, and defendant claims that they show just the contrary. We do not attach much importance to this evidence. All of the genuine signatures were.

made long after the mortgage was executed; the most of them were made nearly four years afterwards. It is impossible to determine by comparison what changes occurred in the handwriting of the defendant by the lapse of time. Another reason why we do not attach much importance to a comparison is that all of these genuine signatures but one were made after the defendant had answered denying her signature to the mortgage.

It is apparent that deeds, mortgages, and other instruments requiring acknowledgment before an officer, ought not be set aside without clear and satisfactory evidence. The seal and acknowledgment of the officer, should in such cases be given proper consideration. The acknowledgment is a provision which the law makes for the security of titles and the protection of property owners from fraud and imposition. When such an instrument is properly acknowledged and certified, it may be read in evidence without further proof. Code, § 3659.

We think the district court was correct in holding that the defendant executed the mortgage in suit.

AFFIRMED.

97	65
81	680

EWING, JEWETT & CHANDLER V. FOLSOM ET AL.

1. Mechanic's Lien: FILING OF: EVIDENCE OF CLERK'S SIGNATURE.

The claim for a mechanic's lien in this case was marked filed, over the signature of one who appeared from a jurat attached and belonging to the same paper to be the clerk of the district court. *Held* that it appeared, at least *prima facie*, that the person who marked the paper as filed was the clerk of the district court.

2. ———: SUB-CONTRACTOR: NOTICE FILED AFTER THIRTY DAYS: RECOVERY LIMITED TO AMOUNT DUE. By the agreement between the owner and the contractor, a claim which the former held against the latter was to be allowed as a payment on the last installment to be paid under the contract. The sub-contractor's claim for a lien was filed more than thirty days after the last item in his account. *Held* that he could

 Ewing, Jewett & Chandler v. Folsom et al.

recover only what remained due from the owner to the contractor, after deducting the claim aforesaid. Miller's Code, § 2134.

Appeal from Polk Circuit Court.

SATURDAY, SEPTEMBER 26.

ACTION in chancery to enforce a mechanic's lien. There was a decree granting the relief prayed for by plaintiffs. Defendants Hale and wife appeal.

T. F. Stevenson and *J. B. Johnson*, for appellants.

Smith & Morris, for appellees.

BECK, CH. J.—I. The defendant Folsom, who is a builder, entered into a contract with defendant Hale to erect a dwelling-house upon land owned by Hale's wife, who is also made defendant. Folsom obtained of plaintiffs lumber used in the building, and, about ninety days after the date of the last item of the account therefor, plaintiffs filed their claim for a lien in the office of the clerk of the district court.

II. Appellants first insist that the evidence fails to show that the claim for the lien was filed in the office of the clerk of the district court. The claim itself is in evidence, and shows by the signature of the clerk that it was filed. But defendants claim that there is no evidence showing that the person signing the certificate of filing was the clerk of the district court. The jurat to the affidavit made to the claim shows that the person making the certificate was the clerk of the district court. The official character of this person is not questioned in the pleadings or proof. Nor was any objection on this ground made in the court below. The certificate indorsed upon the claim shows, at least *prima facie*, that the person making it was the clerk of the district court.

III. It is also insisted that the claim filed by plaintiffs does not show that plaintiffs are entitled to a lien. We think

1. MECHAN-
IC'S LIEN:
filing of; evi-
dence of
clerk's signa-
ture.

differently. It shows a contract between Hale and Folsom for building the house, the purchase by him of the lumber to be used in building the house, and that it was furnished by plaintiffs. We think it sufficiently shows the use of the lumber in building the house. Other objections to the claim for a lien are equally groundless, and require no attention.

IV. The preponderance of the evidence shows that, at the time the building contract was entered into, Folsom agreed to regard as payment upon the last installment to be received by him for the work an account for professional services rendered to him by Hale, who is a physician. The statute provides that a sub-contractor who files his claim for a lien after the expiration of thirty days from the day the last of the materials were furnished may enforce his lien for the balance due from the owner of the property to the contractor. Miller's Code, § 2134.

The parties to the building contract having agreed that the account for medical services should be credited upon the last installment due Folsom, it was payment thereon *pro tanto*. Surely, parties to a contract may agree at any time what shall be regarded as payment thereon, and such agreement is not to be regarded as varying the original contract. A contract may provide for payment in money or property. If the parties agree at any time that payments may be made differently, this is not a variance of the contract; it is simply an agreement for making and accepting payment; it is an accord as to the performance of the contract. As the parties had settled by agreement that the account for medical services should be deducted from the last installment to be paid Folsom, the sum due him was the amount remaining after deducting the account from the sum remaining unpaid under the contract. The plaintiffs are entitled to a lien for no greater sum. The evidence shows that there is due Folsom from Hale \$115 after deducting the account for medical services. This is established by the testimony of both Hale and

2. — : sub-contractor : notice filed after thirty days : recovery limited to amount due.

Allison v. Graham et al.

Folsom. The lien of plaintiffs for that sum ought to be established.

There is a question made by appellants as to the correctness of the decree of the circuit court in providing for the payment of the costs out of the proceeds of the property realized from the sale under the decree. The appellants, having in their answer offered to pay the amount found due from them in this opinion, ought not to pay any costs in this action. The question as to the correctness of the provision of the decree as to the costs need not, therefore, be considered.

The decree of the circuit court will be reversed, and the cause will be remanded to the circuit court for a decree in harmony with this opinion; or, at the option of either appellants or appellees, such a decree may be rendered in this court.

REVERSED.

ALLISON V. GRAHAM ET AL.

1. **Attachment of Real Estate: PRIOR PAROL AGREEMENT TO SELL: ATTACHMENT TAKES PRECEDENCE.** One of the distributees of an estate was also a debtor thereto, and he agreed in parol with the administrator that the latter should sell his interest in the real estate and apply the proceeds on the debt. But, before any conveyance of the realty was made under the agreement, the real estate was attached as the property of the distributee. *Held* that the administrator had no such lien or interest as would defeat the attachment.

SATURDAY, SEPTEMBER 26.

Appeal from Madison Circuit Court.

THE plaintiff commenced an action against the defendant Graham, and caused an attachment to issue, which was levied on certain property belonging to Graham. J. S. McCaghan

intervened in the action, and claimed that he was the owner of, or entitled to, the attached property. The court held that the facts stated in the petition of intervention did not entitle the intervenor to the relief asked, and he appeals.

J. S. McCaughan, for appellant.

J. P. Steel, for appellee.

SEEVERS, J.—The intervenor is administrator of the estate of Wm. M. Graham, who died prior to February, 1882. The said Graham, at his death, was the owner of certain real estate. The defendant is one of his heirs at law, and is the owner of an undivided interest in the real estate. On the fourteenth day of March, 1883, the plaintiff caused such interest to be attached. The petition of intervention states that the defendant Graham was justly indebted to the estate, and that in March, 1882, the intervenor, as administrator of said estate, entered into a parol agreement with the defendant, whereby it was agreed that any and all sums due or to become due to the defendant, as distributee of the estate, should be applied on such indebtedness, and it was further agreed that the entire interest of the defendant in the estate should be turned over to the intervenor to be applied as aforesaid. It was further agreed that the intervenor should sell such interest in the real estate, and that the defendant should execute conveyances to the purchaser. That, acting under said agreement, the intervenor sold said interest of the defendant in the real estate, and that the defendant conveyed the same to the purchaser on the twenty-third day of March, 1883. Wherefore the intervenor asked that his interest in, claim to and lien upon the attached property be declared to be superior to the lien of the attachment. A demurrer to the petition of intervention was sustained.

The intervenor does not claim to have purchased the attached property, and, if he did, it is doubtful, to say the least, whether an administrator, without leave of the probate

Pease et al. v. Thompson.

court, can take real estate in payment of the indebtedness to the estate. What the intervenor does claim is that, under and by virtue of the parol agreement, he obtained a valid and subsisting interest in or lien on the defendant's interest in the real estate. But we are of the opinion that he obtained neither. At most, the intervenor became the agent of the defendant to sell the latter's interest in the real estate, and apply the proceeds in a certain manner. The defendant could revoke such agency at any time prior to the conveyance which it was agreed should be made to the purchaser. The title to the real estate remained in the defendant, and, when the attachment was levied, a valid lien thereon was created. It is true that it is stated that such interest was "turned over" to the intervenor. No lien was thereby created, but a mere agency to sell is all that can be legally implied. The agency related to an interest in real estate, possession was not taken, no part of the consideration was paid, and we are clearly of the opinion that the intervenor did not obtain any lien on or interest in the real estate prior to the levy of the attachment.

AFFIRMED.

PEASE ET AL. V. THOMPSON.

1. **Contract for Work: SUBSTITUTE OF EMPLOYE BOUND BY.** Where M. contracted to paint a house for a certain sum, and commenced the work, but abandoned it to P., who finished it, P. was bound by the terms of the original contract.
2. **Mechanic's Lien: FORECLOSURE: IDENTIFICATION OF PROPERTY.** Where the petition described the land on which the house on which the work was done was situated, and the answer admitted that defendant was the owner of the building on the land described in the petition, and the claim for a lien was offered and received in evidence, and the evidence all the way through showed that the work was done on defendant's house, *held* that it was error to refuse to establish a mechanic's lien, on the ground that there was no evidence that the labor was performed on the house and premises described in the petition, and on which plaintiffs claimed a lien.

Appeal from Jasper Circuit Court.

SATURDAY, SEPTEMBER 26.

THIS is an action in equity by which the plaintiff Pease seeks to establish a mechanic's lien upon the dwelling-house of the defendant for furnishing paint and painting the same. Pending the action, Pease assigned certain parts of the claim to the other plaintiffs, and the court rendered three separate judgments for the plaintiffs, but refused to establish the claim as a lien upon the building. Both parties appeal.

D. Ryan and Cragan Bros., for plaintiffs.

Winslow & Varnum, for defendant.

ROTHROCK, J.—There is a conflict in the evidence as to the amount that was to be paid for painting the house. The plaintiff Pease claims that the painting was to be done and measured and paid for by the yard at the usual price. The defendant claims that the materials were to be furnished and the whole work done for \$125. The contract was made between one Maul and the defendant. It appears that Maul was a painter in the employ of Pease, and Pease authorized him to make contracts for painting. Maul went to the defendant's house and made the contract without stating that he was acting for Pease. Maul commenced the work, and before it was completed, for some reason not disclosed in the evidence, abandoned the work and left that neighborhood. As some of the witnesses express it, he "ran away." Pease took up the work, and claims that he completed it.

We think that there is a fair preponderance of the evidence to the effect that Maul contracted to furnish the materials and do the work for \$125. Pease was bound by this contract. It is conceded that the plaintiff has been paid \$25. This leaves the sum of \$100 and interest due to the plaintiffs,

 Pease et al. v. Thompson.

provided the work was completed. The defendant complains that a large part of the painting was not done. Maul testifies that all the work was done that he contracted to do, and, in view of the acts of the defendant, and certain letters written by him on the subject, we incline to think that Pease finished the work that the contract called for. The judgment should be for \$100, with interest at six per cent per annum from August 1, 1883. And, as this amount is less than the aggregate of the assignments of the claim from Pease to the other plaintiffs, judgment will be rendered in their favor in proportion to their respective claims.

II. The court refused to establish a mechanic's lien, as prayed, because there was no evidence that the labor was performed on the house and premises described in the petition, and on which plaintiff claims a lien. The evidence all the way through the trial shows that the painting was done on the defendant's dwelling-house. This evidence, when considered in connection with the pleadings, was sufficient to identify the building upon which the work was done. There should have been a decree establishing the claim as a lien. This disposition of the case leads to a reversal upon plaintiffs' appeal, and to a modification of the judgment on defendant's appeal, and, as both parties are crowned with partial success by their appeals, each will be required to pay one-half the costs in this court.

REVERSED.

WISE V. CHANEY, CIRCUIT JUDGE.

87	73
108	186
67	73
137	151

1. **Estates of Decedents: CONTEMPT OF ORDER TO PAY ASSETS TO ADMINISTRATOR: FACTS INSUFFICIENT TO PURGE: CODE, § § 2379, 2380.** Plaintiff was ordered by the defendant, as judge of the circuit court, under § § 2379 and 2380 of the Code, to pay the administrator certain moneys which had come into his hands belonging to the estate. Plaintiff refused to pay the money, on the ground that he had received it as a mere clerk of a prior administrator, and had paid it out (without authority it would seem) to the widow for the support of her family, and in discharge of claims against the estate, and that he had in his possession no money, either of his own or belonging to the estate. *Held* that this showing did not purge him of the contempt in disobeying the order, and that he was lawfully committed to jail until he should comply therewith.

SATURDAY, SEPTEMBER 26.

THIS is a proceeding by *certiorari* originally brought in this court.

John A. Patterson, for plaintiff.

No appearance for defendant.

BECK, CH. J.—I. The circuit court of which defendant is judge, sitting as a court of probate in a proceeding touching the settlement of an estate, upon the application of the administrator, made an order requiring plaintiff to pay to the administrator certain money of the estate, which the court found had come into the hands of plaintiff, and which he failed to pay over. The plaintiff made a showing to purge himself of contempt in failing to obey the order, to the effect that he had received the money as a mere clerk of a prior administrator who had been removed, and that he had disbursed the money in payment to the widow of the deceased, for the support of her family, and in the discharge of claims against the estate. He also showed that he had no money,

either of his own or of the estate, in his possession. The circuit court, holding that plaintiff had failed to purge himself of contempt, ordered him to be imprisoned until he should pay the money in obedience to the order.

II. The proceedings resulting in the order of the court requiring plaintiff to pay the money found to be in his hands are authorized by Code, § § 2379, 2380. We cannot in this case inquire whether the evidence before the circuit court justified the order, and thus review, as upon an appeal, that decision. The contempt for which the plaintiff stands committed consists in disobedience of this order without sufficient justification or excuse therefor. We are required to determine whether there was such a disobedience without excuse, for the circuit court would not have jurisdiction to punish for the contempt unless it in fact existed. The statement of plaintiff, made to purge himself of contempt, shows the receipt of the money of the estate. But it fails to show lawful excuse for not paying it over upon the order of the court. Plaintiff had no right to disburse the money as shown by him. This could have been lawfully done only by the administrator under authority and approval of the court. His other excuse, that he had no money of his own in his possession will not do. It would be a convenient way, if this excuse should be regarded as sufficient, for one required to surrender money or property of an estate, to divest himself thereof, and thus defeat the order of the court and justice.

We reach the conclusion that plaintiff was lawfully committed for the contempt, and that the writ of *certiorari* must be

DISMISSED.

Luce v. The Chicago, St. Paul, Minneapolis & Omaha R'y Co.

LUCE V. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA
R'y Co.

1. **Railroads: EMPLOYE IN COAL-HOUSE: INJURY BY NEGLIGENCE OF CO-EMPLOYEE: COMPANY NOT LIABLE.** One employed in a railroad coal-house, and injured by the negligence of a co-employee while loading coal upon a car, cannot recover of the company, because the injury in such case is not in any manner connected with the use and operation of the railroad. *Foley v. Chicago, R. I. & P. R'y Co.*, 64 Iowa, 644, and *Malone v. Burlington, C. R. & N. R'y Co.*, 61 Id., 326, and 65 Id., 417, followed.

Appeal from O'Brien District Court.

SATURDAY, SEPTEMBER 26.

ACTION to recover for a personal injury. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

J. H. & C. M. Swan, for appellant.

Alfred Morton, for appellee.

ADAMS, J.—At the conclusion of the plaintiff's evidence, the defendant moved for an instruction to render a verdict in its favor. The court refused to so instruct, and the defendant assigns the refusal as error.

The undisputed evidence shows that the plaintiff was employed in a coal-house of the defendant. While so employed hoisting coal for the purpose of filling a car, a co-employee so negligently managed a crane which they were using in the work that it struck the plaintiff's arm and broke it. The danger arising from the use of the crane does not appear to have been greater or less by the fact that it was used in loading a railroad car, nor does it appear that the plaintiff while engaged in his duties was exposed to any danger from the operation of the road. The case comes within *Malone v.*

67	75
78	586
78	586
67	75
87	213
67	75
106	59
67	75
1108	101
67	75
116	515

 Lane v. Lane.

Burlington, C. R. & N. R'y Co., 61 Iowa, 326 and 65 Id., 417, and *Foley v. Chicago, R. I. & P. R'y Co.*, 64 Id., 644. In our opinion the evidence showed no liability, and the defendant's motion to instruct should have been sustained.

REVERSED.

67	76
80	30

 LANE V. LANE.

1. **DIVORCE: DESERTION: EVIDENCE.** Upon consideration of the evidence in this case, *held* that a divorce should have been granted on the ground of desertion.

Appeal from Appanoose District Court.

SATURDAY, SEPTEMBER 26.

ACTION for divorce, on the ground of cruelty, neglect, etc. The defendant denied the allegations of the petition, and in a cross-bill asked for a divorce. The divorce was denied upon both petitions by the district court, and both were dismissed. Plaintiff appeals.

Tannehill & Fee, for appellant.

No appearance for appellee.

BECK, CH. J.—The plaintiff has not appealed, and the case therefore cannot be reviewed as it is presented by her petition and evidence. The defendant asks for the divorce in his cross-bill on the ground of desertion by the plaintiff. We think the desertion is established. The parties were married in 1880, and lived together but a few months, when plaintiff left her husband, and did not again return. The defendant is above seventy years of age, and the plaintiff is more than sixty. It appears that there is no affection between them, and each is desirous of separating from the other. The law

The State v. Wallace et al.

affords them an avenue of escape from the marriage relations through the desertion of the wife, which is satisfactorily established. The decision of the district court is reversed, and the cause will be remanded for a decree in harmony with this opinion.

REVERSED.

67	77
107	45

THE STATE V. WALLACE ET AL.

1. **Fraudulent Transfer of Notes: HUSBAND AND WIFE: FACTS NOT ESTABLISHING.** The evidence in this case considered and *held* insufficient to show that a gift of certain notes by a husband to his wife was in fraud of creditors.

Appeal from Buchanan District Court.

SATURDAY, SEPTEMBER 26.

IN 1872 judgment for a fine and costs was rendered against the defendant Alex. McK. Wallace in the district court of Buchanan county. This action is brought to subject to the payment of the judgment certain land conveyed in 1870 to Wallace's wife, the defendant Annie E. Wallace. There was a decree for the plaintiff. The defendants appeal.

John J. Ney, for appellant.

E. E. Hasner, for appellee.

ADAMS, J.—In 1870 the defendant A. McK. Wallace, holding certain promissory notes against his brother, William Wallace, to the amount of \$800, gave the notes to his wife, the defendant Annie E. Wallace, and she surrendered the notes to William in consideration of the conveyance to her by him of the land in question. At that time A. McK. Wallace had been in business as a partner with one Locke, under

the firm name of Locke & Wallace. The firm had become somewhat indebted for goods purchased, and a judgment for about \$1,600 had been rendered against them.

The plaintiff contends that Annie E. Wallace received the notes against William Wallace as a gift from her husband, and at a time when he was insolvent, or contemplated insolvency; that she accordingly received the notes in fraud of her husband's creditors, and now holds the land, which was conveyed to her by William Wallace in consideration of her surrender of the notes, in trust for her husband's creditors, including the plaintiff. It is not contended that the transfer was made with an intention to defraud the plaintiff. It is impossible that there could have been such intention. The plaintiff was not then a creditor. Not only had its judgment for the fine not then been rendered, but the crime had not then been committed. The plaintiff's reliance is based upon the alleged fact that the transfer was made to defraud others who were at that time creditors.

Whether, if actual fraud in the transfer were proven, the plaintiff would be entitled to the relief claimed, we need not determine, because, in our opinion, it is not proven. The evidence upon the point is confused, meager and unsatisfactory. A. McK. Wallace seems to have owed very little, if any, unsecured indebtedness, except as a member of the firm of Locke & Wallace, and he testifies that that firm was solvent during the time that he was a member of it, and his testimony in this respect does not appear to be overcome.

The plaintiff relies mainly, as we understand, upon certain prior acts of A. McK. Wallace having the appearance of an attempt to conceal property. But these acts were done before the Locke & Wallace indebtedness was incurred; and without more evidence as to his financial condition then and afterwards we cannot say that they were fraudulent, still less that the transfer of the notes was fraudulent. In our opinion, the judgment of the district court must be

REVERSED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,

AT
DAVENPORT, OCTOBER TERM, A. D. 1885,
IN THE THIRTY-NINTH YEAR OF THE STATE.

PRESENT:
HON. JOSEPH M. BECK, CHIEF JUSTICE.
" AUSTIN ADAMS, }
" WILLIAM H. SEEVERS, } JUDGES.
" JOSEPH R. REED, }
" JAMES H. ROTHROCK. }

THOMPSON V. BENEPE ET AL.

1. **Injunction: POWER OF JUDGE TO GRANT IN VACATION: WHAT IS VACATION.** A judge has authority to grant an injunction in vacation; (Code, § 3389-3394;) and the word vacation as here used means when the court is not actually in session, and is not to be restricted to the time between terms.

Appeal from Jasper Circuit Court.

TUESDAY, OCTOBER 6.

AN injunction was issued in this case, which the defendant moved to dissolve. The motion was overruled, and the defendants appeal.

Winslow & Varnum, for appellants.

Alanson Clark, for appellee.

SEEVERS, J.—The circuit court was in session from December 1 until December 11, 1884, except during the intervening Sunday. The injunction was granted by the judge of said court on the fourth day of December, and such allowance indorsed on the petition. The injunction was afterwards issued by the clerk.

Counsel for the defendants contend that a judge has no power to grant an injunction during the time the court is in session, and therefore the motion to dissolve should have been sustained. The record fails to show that the allowance was made while the court was actually in session. We must therefore assume, as error cannot be presumed, that the order was made by the judge at the time when the court was not in fact in session. That it was constructively in session will be conceded.

The statute provides that a temporary injunction may be granted by a court or judge thereof in which the action is pending. If the order is made by the court, the clerk shall make an entry thereof in the court record, and issue the order accordingly. If made in vacation, the judge must indorse the order on the petition. Code, §§ 3339–3394. As the rights of the defendants are precisely the same whether the allowance is made by the court or judge, it is difficult to see how they were in any respect prejudiced, if the allowance was made during the term time, or while the court was actually in session. But if the order cannot be made by the judge during the session of the court for want of power, it is possible that prejudice should be presumed, as counsel contend, and that there are but two periods of time. One

Reeves v. Chambers et al.

is term time and the other vacation, and the latter begins when the former ends. There cannot be, we think, a fixed and definite meaning given to the word "vacation." That it ordinarily means the time between terms is undoubtedly true. See Bouv. Law Dict. But whether this meaning should be given to the word in any particular instance depends upon the subject-matter, and the necessity which exists that some other meaning should be adopted. When the subject-matter is considered, as well as the usual purposes for which an injunction is sought as a protection against wrong or the invasion of legal rights, we think the word "vacation," as used in the statute, should be construed to mean such time as the court is not actually in session.

AFFIRMED.

REEVES V. CHAMBERS ET AL.

1. **Principal and Surety:** ACTION AGAINST: RIGHT TO PLEAD CLAIM OF PRINCIPAL ALONE AS COUNTER-CLAIM. A surety may be set up any defense that would be available to his principal, and so the principal and surety, when sued on their obligation, may set up as a counter-claim any demand which the principal, if sued alone, might plead as a counter-claim. Section 2659 of the Code does not apply to such a case.

Appeal from Guthrie Circuit Court.

TUESDAY, OCTOBER 6.

THIS is an action upon an injunction bond. It appears that the defendant R. P. Chambers brought an action against the plaintiff to enjoin him from entering upon certain land belonging to Chambers, or from operating and opening a coal mine thereon. A temporary injunction was issued, and a bond given, which the defendant Job Chambers signed as surety. The injunction was dissolved, pending the action, and the

action was afterwards tried, and there was a judgment rendered for the defendant therein. This action was brought upon the injunction bond. The defendants set up a counter-claim, in which it was alleged that the plaintiff herein was indebted to R. P. Chambers in the sum of \$240, for failure to pay royalty on coal mined, and for failure to work the mine, and for destroying and removing the curb of the shaft of said mine, and for other injuries thereto. The plaintiff moved to strike out the counter-claim, upon the grounds that the same did not "arise out of the contract or transaction set forth in the petition, nor is it connected with the subject of the action; that it is not a cause of action existing in favor of all the defendants against the plaintiff." The motion was sustained, and defendants appeal.

C. Haden and Charles S. Fogg, for appellants.

W. H. Stiles and Lyman Porter, for appellee.

ROTHROCK, J.—I. The record shows that R. P. Chambers was the principal and Job Chambers was surety in the bond in suit, and they were so considered by the court in ruling on the motion. The indebtedness set up in the counter-claim was a personal claim of R. P. Chambers against the plaintiff. It was such a claim as would have been the ground of an original action in his favor against the plaintiff. He could not in such action join Job Chambers as a plaintiff therein. The question to be determined is, can he and Job Chambers set up the counter-claim as a ground for the defeat of a recovery by plaintiff upon the injunction bond? It is claimed that such counter-claim cannot be pleaded because it is not a cause of action arising out of the contract or transaction set forth in the petition, nor connected with the subject of the action; neither is it new matter constituting a cause of action in favor of all of the defendants against all of the plaintiffs, as required by section 2659 of the Code.

We do not think that the counter-claim arose out of the bond in suit, and it does not appear from the record that it was connected with it; and it must be conceded that the counter-claim is not a cause of action in favor of both the defendants and against the plaintiff. But Job Chambers is not primarily liable upon this bond. He is a surety, and it is his right to demand that the property of his principal shall be exhausted before resorting to his property to collect any judgment which may be recovered upon it. It is a fundamental rule that a surety may set up any defense which would be available to his principal. If sued alone, he may, with the consent of his principal, avail himself by way of counter-claim of a debt due from the plaintiff to his principal. Code, § 2661. While it is true, in the case at bar, that the surety has no personal claim against the plaintiff, yet the policy of our laws is to avoid circuity of actions. If the counter-claim cannot be pleaded in this action, and if it is a valid and meritorious claim, the ruling of the court below would require the principal to bring another action against the plaintiff, recover a judgment against him, and collect that judgment, and allow a judgment to go against him on the injunction bond. We think that the provisions of section 2659 of the Code are not applicable in such a case, and that subdivision 3 of that section has reference to the principal defendants in an action. The position of the surety is such that the principal should be allowed to defeat recovery on the bond if he can.

II. Counsel for the plaintiff have argued the case upon the theory that the counter-claim was adjudicated in the former action. The record does not show this claim to be well founded. If such was the fact, the plaintiff should have presented us with a record upon which we could have determined that question. It does not appear what was adjudicated in the former action.

REVERSED.

67	84
136	578

WISE v. ROTHSCHILD BROS.

1. **Practice in Supreme Court:** CAUSE CONSIDERED AS PRESENTED BY COUNSEL. Although the record does not necessarily show that a certain question in a case was raised below, yet, when counsel agree in presenting the cause here as if such question were properly before the court, it will be so considered.
2. **Attachment: GARNISHMENT: NOTICE OF GARNISHMENT TO PRINCIPAL DEFENDANT: WHAT NECESSARY.** Where one is sued in attachment and brought into court by proper notice, and the attachment is served upon his supposed debtor by process of garnishment, no valid judgment can be rendered against the garnishee unless notice of the garnishment has also been served on the principal defendant, as required by § 2975 of the Code, as amended by chap. 58, Laws of 1830. The original notice in the action does not avail for the purpose of the garnishment.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 6.

ACTION in equity to set aside a judgment rendered against the plaintiff as garnishee. There was a decree for the plaintiff. The defendants appeal.

Good, Wishard & Phillips, for appellants.

Cole, McVey & Cole, for appellee.

ADAMS, J.—The defendants, E. Rothschild & Bros., brought an action against one I. H. Wise, and caused the plaintiff, Bernhart Wise, to be garnished. The garnishee answered, admitting an indebtedness of \$257.25. Afterwards the garnishing plaintiffs took judgment against the garnishee for \$987.75. The garnishee, the present plaintiff, brings this action to set aside the judgment on the ground that the garnishing plaintiffs “fraudulently imposed upon the court and this plaintiff, by causing to be entered of record in said court a judgment for the sum of \$987.75, and costs and interest, and in failing to comply with the statute

in such case made and provided." The counsel for the appellee say in their argument: "There is, as we view it, but one question in this case, and it is this: The judgment against the garnishee was rendered without notice to the principal debtor: is it valid?" They also say: "The circuit court followed *Williams v. Williams*, 61 Iowa, 612, and held that the judgment against Wise was without jurisdiction, as no notice was given as required by section 2975 of the Code as amended by chapter 58 of the Acts of the Eighteenth General Assembly."

We have looked through the record, and we have to say that we do not discover anything which necessarily shows that such question was raised in the court below. But the counsel for the appellee state in argument that it was considered as raised, and was the question upon the determination of which the court rendered a decree in the plaintiff's favor, and the counsel for the appellant seem to concede that this is so, and they now treat the question as being properly before us. We shall proceed to treat the question as the counsel treat it.

It appears to be agreed that an original notice was served upon the principal defendant, I. H. Wise, and that he appeared in the action. It appears, also, to be agreed that no specific notice of the garnishment proceedings was served upon him. The statute which the garnishee in that action, (plaintiff in this action,) relies upon is in these words: "No judgment shall be entered in any garnishment proceedings, condemning the property or debt in the hands of the garnishee, until the principal defendant shall have had ten days' notice of such proceeding." The garnishment in this case was by attachment. The appellants' position is that the original notice served upon the principal defendant in the action in which the writ is issued is sufficient, because the principal defendant, having thus been once brought in, must be presumed to have notice of whatever is done in the case, including the garnishment proceedings. But in our opinion

 Servoss v. The Western Mutual Aid Society.

this position cannot be sustained. The principal defendant may have no defense to the action, and when this is so he ought not to be put to the expense of employing counsel to watch the case; nor, indeed, if he does employ counsel to defend in the action, should he be put to the expense of watching against garnishment proceedings which would call for a separate hearing and determination. Besides, we think that the language of the statute is such that by any fair construction we ought to hold that the notice provided for is actual notice of the proceedings, and not actual notice of something else operating as constructive notice of the proceedings. The service of the original notice cannot operate as actual notice of more than is involved in the issues tendered by the petition. The garnishment proceedings are distinct, and merely in aid of the collection of the debt. There is no reason to suppose that such proceedings will be had until garnishment is effected. In our opinion, without the service of actual notice of the proceedings, the court has no jurisdiction to render judgment against the garnishee. A person whom the statute makes a necessary party to the proceedings is wanting.

AFFIRMED.

 SERVROSS V. THE WESTERN MUTUAL AID SOCIETY.

1. **Life Insurance: DEFAULT IN PAYMENT OF ANNUAL DUES AND ASSESSMENTS: WAIVER OF DEFAULT AND RESTORATION OF POLICY: FACTS NOT CONSTITUTING.** Plaintiff's husband held a life policy for her benefit in the defendant company, but certain assessments and dues were overdue Dec. 7, 1882, whereby the policy was forfeited, when defendant's secretary wrote him, in substance, that if he would remit immediately he would send receipt without default. Remittance was not then made, but on the 25th of that month plaintiff's husband was taken sick, and on the 31st of the month he died. On the 30th, however, at his request, the plaintiff remitted the money, and it was received at defendant's office January 1st, and receipts were returned in printed form, each containing the provision that it should be valid only

67	86
93	412
47	80
137	194

Servoss v. The Western Mutual Aid Society.

on condition that the assured was alive and in good health on the day of its date; but there was *written*, in the hand of the secretary, on the margin of each receipt the words "no default." After defendant was informed of the death of the assured, it returned the money to plaintiff.

Held—

- (1) That, because remittance was not made immediately upon receipt of the letter of Dec. 7, the offer therein contained to waive the default was at an end.
- (2) That, since the assured was not alive at the date of the receipts, the receipts were invalid by their own terms. The written words "no default" not being repugnant to the printed conditions of the receipts, they are to be construed in connection therewith; and the true meaning is that there should be no default provided the assured was alive and in good health at the time of their date.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 6.

ACTION ON A LIFE INSURANCE POLICY. Judgment for plaintiff, and defendant appeals.

W. E. Miller, W. S. Dungan and William Kennedy,
for appellant.

Wright, Baldwin & Haldane, for appellee.

REED, J.—The cause was submitted in the circuit court on an agreed statement of facts, by which it was shown that defendant is a mutual association, organized for the purpose of insuring the lives of its members, and on the tenth day of June, 1882, it issued to George Servoss, who was plaintiff's husband, a certificate of membership, by which it bound itself, in consideration of the payment by him of an admission fee of twelve dollars, and the payment on the first day of December of each year of a further sum not exceeding five dollars, and the payment on or before maturity of such benefit assessments as might be legally levied by its executive committee, to pay to plaintiff, on his death, the proceeds of one full assessment at schedule rates upon all contributing members of the association, not exceeding \$2,000. Said cer-

Servoss v. The Western Mutual Aid Society.

tificate contained the following provisions, viz.: "This certificate shall be void—*First*, if any assessment is not received at the Des Moines office within thirty days from date thereof; *Second*, in case annual dues are not paid on or before the day when due, as above stated. * * * Any member whose certificate has become void from non-payment of dues or assessments may have said certificates restored from date of payment of such delinquent dues or assessments, by paying them up in full, and furnishing the society with a certificate of good health, providing such certificate be first approved by the medical director."

On the seventh day of December, 1882, there was due from said George Servoss to defendant the sum of five dollars annual dues, payment of which had matured on the first of December, and the further sum of four dollars and sixty cents for two benefit assessments, which had been legally levied by defendant's executive committee prior to that date, and on that day (December 7th) defendant's secretary wrote and mailed the following letter to said George Servoss: "The current year's annual dues of yourself and Emma L. Servoss, No. 4,983, have not been received at this office. Supposing this simply an oversight on your part, we remind you of the fact, and add that, if remittance be immediately sent us to cover the above ten dollars, we will send receipt without default." On the twenty-fifth day of December Servoss was taken sick, and so continued until the thirty-first of that month, when he died. On the thirtieth, plaintiff, at the request of her husband, remitted the amount of said dues and assessments to defendant by mail, and it was received at its office in Des Moines on the first of January, the day after plaintiff's husband died, and on the same day defendant's secretary, without any knowledge of his sickness or death, mailed to Servoss' address receipts for said money. One of these receipts acknowledged the payment by him of the amount of the annual dues, and the other of the amount of the assessments. On the margin of each the words "no

default" were written in the handwriting of the secretary, and each contained the provision that if it was dated after the maturity of the dues and assessments it should be valid only on condition that said Servoss was alive and in good health on the day of its date. After it was informed of the death of her husband, defendant returned said amounts to plaintiff. The parties are agreed that by its terms the policy or certificate becomes void upon a failure to pay the annual dues or benefit assessments at the time therein specified, and that plaintiff has no ground of recovery, unless defendant has waived the forfeiture on account of the failure of George Servoss to pay the annual dues on the first of December, 1882.

Plaintiff's position is that the letter of December 7th is an offer by defendant to restore the policy, which had become void because of the failure to pay the annual dues on the first of the month, upon the single condition that Servoss would then remit the amount of said dues, and that it thereby waived the provision of the policy, which requires the furnishing of a certificate of good health, which should be approved by the medical director, as a condition to the restoration of a policy which had become void, and that the remittance of the money on the 30th was an acceptance by him of this offer, and that the policy was restored from that time, regardless of the condition of his health at that time. And this position has been skillfully presented and persistently urged by her counsel. In our opinion, however, it cannot be maintained. It may be conceded that the letter of December 7th was an offer by defendant to waive the forfeiture of the policy on the single condition that Servoss would remit the amount of the dues. And it may be true, also, that if he had acted on this offer at once, and remitted the amount, the policy would have been restored, even though at the time he had been dangerously sick. But it was not a continuing offer. It is presumed to have been made in view of the then existing circumstances affecting the risk, and it

is made an express condition of the offer that the amount of the dues be immediately remitted. The letter cannot be construed as an offer to accept the money in twenty-three days and restore the policy regardless of any changes which may have occurred in the mean time in the circumstances affecting the risk.

It is contended, however, that defendant accepted and treated what was in fact done by Servoss as a compliance by him with the offer, and that it cannot for that reason be heard now to assert that its offer was not accepted by him. The receipts which defendant issued when it received the money afford the only evidence of the manner in which it treated what had been done by Servoss. These receipts, as stated above, each contain a provision to the effect that it should be valid only on condition that Servoss, on the day on which they were given, was alive and in good health. They were on printed forms, and defendant's secretary, before they were mailed to Servoss, wrote on the margin of each the words "no default," and it is contended that these words are repugnant to the condition quoted above, and that, as they are in writing, while the other condition is part of the printed form, force should be given to them, while it should be rejected in construing the instrument, and that, when construed according to this rule, the receipt announces an intention by defendant to restore the policy on the single condition that the money had been paid. If the written and printed conditions of the instrument are repugnant or inconsistent, the former are to control. Code, § 3651. We think, however, that there is no such repugnancy or inconsistency between the printed and written portions of this instrument as requires us to reject either. The secretary, in filling out the form, added the writing on the margin, while he deliberately permitted the provision to remain in the body of the instrument. The presumption is that he intended that effect should be given to each, and we think both should be considered in giving a construction to it; and it evidences, when

Schreiner v. Miller.

both provisions are considered, an intention by defendant to restore the policy, notwithstanding the forfeiture which the failure to pay the dues on the first of December had caused, provided Servoss was then alive and in good health. This latter provision was not a condition of the offer contained in the letter of December 7th, and the receipt of the money upon that condition was clearly not an acceptance of the payment of it at that time as a compliance by Servoss with the terms of the offer. When the money was transmitted, the defendant was under no obligation to accept it or to restore the policy. It might, however, designate other conditions upon which it would waive the forfeiture. In the exercise of its right in that respect, it made the provision embodied in the receipt a condition to the restoration of the policy.

We think, upon the facts, the forfeiture was not waived. The judgment will be reversed, and the circuit court will be directed to enter judgment for defendant.

REVERSED.

SCHREINER V. MILLER.

1. **Architect:** SUPERVISION OF BUILDING: NEGLIGENT CONSTRUCTION: DAMAGES. An architect who is employed to furnish plans for a building, and to superintend its construction, is liable for damages if, through his lack of skill or care, the foundations are so defective as to cause the walls to crack.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 6.

ACTION in chancery to enforce a mechanic's lien. There was a decree in the court below establishing the lien for the amount claimed by defendant. Plaintiff appeals.

Goode, Wishard & Phillips, for appellant.

D. Donovan, for appellee.

BECK, CH. J.—I. The pleadings and evidence show that plaintiff, who is an architect, under a contract with defendant, prepared plans and specifications, and superintended the construction, of a brick building, intended to be used as a hotel. For the value of his services remaining unpaid, \$245.55, he claims a mechanic's lien, and brings this action to enforce it. The defendant, among other defenses, pleaded to the action a counter-claim in the sum of \$1,500, for damages sustained by him by reason of "faulty designs, defective plans and specifications, and want of care and skill in the erection and completion of the building under the management and supervision of plaintiff." The defendant's counsel also insist in argument that plaintiff is not entitled to a lien for services rendered by him as an architect and superintendent, on the ground that the law affords no such remedy for services of that character. This objection we need not determine, for the reason that we reach the conclusion upon the facts of the case that the defendant ought to recover upon his counter-claim a sum at least equal the amount claimed by plaintiff.

II. The evidence clearly shows that plaintiff was charged under his employment with the duty of furnishing plans for the building and superintending its construction. That the construction of the building was defective is clearly shown, one of the walls being so badly cracked as to depreciate the value of the house. There are other defects in the plan and construction of the house. Plaintiff, under his employment, was bound to furnish proper plans, and to see that the house was at least reasonably well constructed. That it was not is plain. The crack was caused, as defendant claims, by defective construction of the wall. Plaintiff does not deny the existence of the crack, but attributes it to a defective foundation at the place in the wall where it is found. It was plaintiff's business and duty to see that the house was constructed with reasonable care, and this duty required him to cause the foundation to be sufficiently deep, or otherwise protected, in

Hughes v. Sweeney et al.

order to prevent settling, which would cause the wall to crack. A house is not constructed with reasonable care, the foundations of which are so defective as to cause the walls to crack.

III. The evidence as to the amount of damages sustained by defendant is not explicit in some respects, but it shows, we think, that they at least equal the claim of plaintiff. The house, by repairs and alterations, we conclude from the evidence, could be made to be of the value it would have been had it been constructed with proper care, for about the sum claimed by plaintiff. We therefore conclude that plaintiff ought to recover nothing in this action, and that judgment for costs should be entered against him.

REVERSED.

HUGHES V. SWEENEY ET AL.

1. **Practice in Supreme Court:** CONFLICTING EVIDENCE TO SUSTAIN FINDING OF COURT. This court will not interfere with the finding of a court or jury upon a question of fact where the finding is based upon conflicting evidence.

Appeal from Des Moines Circuit Court.

WEDNESDAY, OCTOBER 7.

THIS is an action to recover the rental of a lot in the city of Burlington, the possession of which plaintiff alleges the defendants wrongfully and willfully retained after the expiration of a lease. There was a trial to the court, and judgment was rendered for the plaintiff for less than the amount demanded in the petition. Plaintiff appeals.

Hall & Huston, for appellant.

John C. Power, for appellees.

ROTHROCK, J.—The plaintiff, being a minor, made a lease through his guardian, by which he leased the lot to the defendants. The lease commenced April 1, 1871, and ended March 31, 1882. The lessees were to pay as rent \$250 per year for the first, second and third years; \$300 for the fourth, fifth and sixth years; \$400 for the seventh, eighth and ninth years; and \$475 for the tenth and eleventh years. The defendants covenanted to erect buildings upon the lot at a cost of not less than \$6,000. At the expiration of the lease the plaintiff was to have the privilege of purchasing the buildings from the defendants. In case the parties should not agree upon the terms of purchase, appraisers were to be appointed, who should estimate the value of the lot, and of the buildings and improvements separately, and plaintiff was to have the privilege of buying the improvements at the appraised value. If the parties should not agree and arrange said matters upon the basis of the appraisement, then the whole property was to be sold, and the proceeds were to be divided *pro rata*. It was further stipulated that, if the parties could not agree upon a final settlement at the expiration of said lease, (March 31, 1882,) then the lease should be extended until the plaintiff became twenty-one years of age, at the rate of \$500 per year, and by consent of parties the lease was extended until the plaintiff became twenty-one years of age, which was October 29, 1882. An appraisement was afterwards made, and on the nineteenth day of January, 1883, the plaintiff exercised his right to purchase the buildings and improvements. He claims that he was entitled to the possession of the property on the twenty-ninth day of October, 1882, and that the defendants should pay him the rental value from that time until the nineteenth day of January, 1883, the date when he came into possession by reason of his purchase.

The defendants claim that they held the possession of the property after the twenty-ninth day of October under a verbal contract made by the plaintiff, by which they were to pay him rent at the rate of \$500 per year. The court found with the

Goodenow v. Parkinson.

defendants on this question of fact, and it is this finding of which the plaintiff complains.

We have examined the evidence, and our conclusion is that the finding of the court is not without support therefrom, and we cannot interfere with the finding of a court or jury upon a question of fact, where the finding is based upon conflicting evidence.

AFFIRMED.

GOODENOW V. PARKINSON.

1. **Contract:** SETTLEMENT OF CONTROVERSY AS CONSIDERATION. An agreement made in settlement of an existing controversy as to the amount which one party should pay the other is founded upon a good and valid consideration.

Appeal from Clinton Circuit Court.

WEDNESDAY, OCTOBER 7.

THIS action was commenced to recover a balance due upon a promissory note. The defendant by his answer, set up that the note was only to be a valid instrument between the parties in case the defendant should succeed in collecting an indebtedness from one Barton, due to these parties as partners. And the defendant further claimed that after the note was given there was an agreement made and indorsed in writing on the note, to the effect that, if the debt due from Barton should not be collected, the defendant should not be liable to the plaintiff on the note in suit. A reformation of the indorsement on the note was prayed in the answer, and the cause was tried as an equity action. The court found that the defendant should pay one-half of what appeared to be due on the note. The defendant appeals, and insists that he should not be required to pay anything. The plaintiff

appeals, and claims that he is entitled to recover all of the note except the payments which are indorsed thereon.

D. A. Fletcher and A. Howat, for plaintiff.

Ellis & McCoy, for defendant.

ROTHROCK, J.—A careful examination of the evidence in the case has led us to the conclusion that the parties obtained in the court below as near a measure of justice as is usually attainable in courts. They were partners for many years in the purchase and sale of live-stock, and in the ownership of lands. They sold stock to one Barton at different times, and he was indebted to them at one time in the sum of about \$1,000. He gave his promissory notes for this indebtedness, payable to the defendant. The defendant executed the note in suit to the plaintiff for \$2,000. The note was executed on the twenty-first day of May, 1874, and payable May 1, 1875, with ten per cent interest. The defendant claims that the only consideration for the note was the fact that he held Barton's notes payable to himself, for the indebtedness due from Barton. The plaintiff claims that the defendant took the claim against Barton as his own, and executed the note in suit to plaintiff, in pursuance of a contract to buy plaintiff's share of the claim against Barton. Barton became involved and unable to pay, and these parties met in May, 1878, for the purpose of a settlement. There was a disagreement and a controversy between them as to the defendant's liability on this note, and the following indorsement was written thereon: "May 9, 1878. Balance due on this note (957.28) nine hundred and fifty-seven 28-100 dollars. This is payable if the two Barton notes are paid; if not, *Parkin* is to pay half—R. L. to *loose* half." The evidence shows that *Parkin* meant Parkinson and R. L. meant Goodenow.

The defendant insists that this indorsement does not express the agreement of the parties, and that it should be reformed so as to relieve him from all liability on the note except in

Lunt et al. v. Neeley et al.

the contingency that the Barton notes should be collected. The plaintiff claims that the indorsement correctly recites the agreement between the parties at the time it was made.

We think that upon this question of fact the preponderance of the evidence is with plaintiff. The plaintiff claims that if such was the agreement it was without consideration. We do not agree with him in this proposition.

The fact is apparent, all through the evidence in the case, that the parties differed in matter of fact as to the defendant's measure of liability on the note in suit. This difference became material as soon as it was apparent that Barton was likely to fail in making payment. The indorsement on the note was evidently a compromise between the parties. It was a concession by each party of part of what he claimed of the other, and was made for the purpose of reaching a settlement of their partnership affairs. It is very plain that the consideration was sufficient to support the agreement.

AFFIRMED.

LUNT ET AL. V. NEELEY ET AL.

1. **Homestead: OWNED BY WIFE UNDER BOND FOR DEED: ASSIGNMENT OF BOND WITHOUT HUSBAND'S CONCURRENCE: SUBSEQUENT ABANDONMENT: INNOCENT PURCHASER FROM ASSIGNEE.** Plaintiffs occupied a homestead which was owned by the wife under a bond for a deed. The wife assigned the bond without the concurrence of the husband. *Held* that the assignment was of no validity; (Code, § 1990; *Stinson v. Richardson*, 44 Iowa, 373;) and that it was not validated by the subsequent abandonment of the homestead. (*Bruner v. Bateman*, 66 Iowa, 488.) But where, after such abandonment, another, who had no notice of the facts rendering the assignment invalid, and no knowledge that plaintiffs claimed any interest in the property, purchased it from one in possession, who appeared to have a perfect record title, *held* that his title was superior in equity to the homestead rights of the plaintiffs.
2. **Principal and Agent: NOTICE TO AGENT: HOW FAR BINDING ON PRINCIPAL.** A principal is not bound by his agent's knowledge of facts learned a year prior to the agency, in a transaction which the agent:

67	97
79	282
67	97
81	686
67	97
85	548
67	97
87	175
67	97
123	551
67	97
128	406
67	97
132	369

Lunt et al. v. Neeley et al.

was conducting on his own account, unless it is shown that such knowledge was present in the agent's mind at the time of the transaction for his principal. *Yerger v. Barz*, 53 Iowa, 76, followed.

Appeal from Polk District Court.

WEDNESDAY, OCTOBER 7.

ACTION to quiet in plaintiffs the title to certain real estate. The district court dismissed the petition. Plaintiffs appeal.

Cardell & Shortley and *Sickmon, Parrott & Long*, for appellants.

Nourse & Kauffman, for appellees.

REED, J.—The following facts are admitted by the pleadings, or established by the evidence.

Plaintiff E. D. Lunt is the surviving husband of Augusta E. Lunt, who died October 11, 1882. The other plaintiffs are her children. Prior to the thirteenth of March, 1873, the property in controversy was owned by the defendant James Neeley, and on that day he entered into a contract with said Augusta E. Lunt for the sale of said property to her. The price agreed upon was \$400, and she agreed to pay the same in monthly installments of \$10 each. He gave her a title-bond, in which he bound himself to convey the property to her upon the payment by her of the purchase price as provided in the contract. She took possession of the property immediately, and occupied it with her family as a homestead. Her husband, E. D. Lunt, was engaged in publishing a newspaper in Perry, the town in which the property is situated. In the fall of 1879 he sold out his business there, and went to Colorado, leaving his family in Perry, however, in the occupancy of said property. His object in going to Colorado was to find a location in which to establish himself in business, and he intended to remove his family there if, upon examination, he found it to be a desirable country

in which to live. He first went to Leadville, and established a job-printing office there. He sold this business out in February, 1880, and went to Buena Vista, where he established a newspaper. He left there in a short time and went to Marysville, where he started another paper; and he was subsequently appointed postmaster at that place.

On the thirty-first day of January, 1880, the said Augusta E. Lunt made a contract with defendant D. W. Payne for the sale of said property to him. She had then paid to Neeley \$220 of the purchase price. Payne paid her that amount for her interest in the property, and she assigned the bond to him. Her husband did not sign or concur in this assignment. She continued to occupy the property as a place of residence until the first of March following, when she yielded possession to Payne, and removed to Colorado, and joined her husband at Marysville, where they lived and kept house for five or six months, when they removed to Denver. In December, 1880, E. D. Lunt returned to Perry, and re-established himself there in business. In January following he was joined by his wife and children, and they moved into a house near the property in controversy, and continued to occupy the same as a place of residence until the death of Mrs. Lunt. On the twenty-fifth of May, 1880, or prior to that, D. W. Payne paid Neeley \$180, that being the amount of the unpaid installments of the purchase price at the time the contract was assigned to him. And on that day Neeley conveyed the property to Maria Payne, who is the wife of D. W. Payne. On the twentieth of June, 1881, Mrs. Payne sold and conveyed it (her husband joining in the conveyance) to Mrs. Minerva Warren for the consideration of \$600. In making the purchase, however, Mrs. Warren acted as agent for C. R. Warren, who furnished the money to pay for the property, and she subsequently conveyed it to him. At the time of the purchase from Mrs. Payne, C. R. Warren had no actual notice that the Lunts had or made any claim to the property; but, during the time it was occupied by them

Lunt et al. v. Neeley et al.

as a homestead, Mrs. Warren had some negotiations with Mrs. Lunt concerning it; Mrs. Warren desiring at that time to purchase it for herself. She knew at that time that the Lunts occupied it as a homestead, and that their right was acquired under the bond from Neeley. She was informed also of the conditions of the bond. During the period between the assignment of the bond to Payne and the conveyance of the property to Mrs. Payne, it was occupied by a tenant, who paid rent to Payne; and after the conveyance to her, and up to the time of the sale to Warren, Mrs. Payne received the rents.

I. Plaintiffs' position is that the sale and assignment of the bond by Mrs. Lunt to Payne are void, for the reason that the property was the homestead, and the husband did not concur in or sign the writing by which the bond was assigned to Payne; and they contend that, if this position is correct, the subsequent grantees acquired no interest in the property. If the controversy was between plaintiffs and D. W. Payne alone, and there were no intervening rights of third parties to affect the case, the correctness of plaintiffs' first position could hardly be questioned. Neither the husband nor wife can, by any separate act, affect the homestead rights of the other, or change the homestead character of the property. When the right of homestead has once attached to the property, it can be relinquished or divested only by a joint conveyance, or by the abandonment of the property as a homestead by both the husband and wife. Code, § 1990; *Barnett v. Mendenhall*, 42 Iowa, 296; *Stinson v. Richardson*, 44 Id., 373. The removal of E. D. Lunt to Colorado, even if intended by him as an abandonment of the property, did not affect the character of the property, nor the rights of the parties. The wife had the right to continue to occupy it, and so long as she exercised that right, the homestead rights of both were preserved. She was in the occupancy of it when the assign-

1. HOME-STEAD: owned by wife under bond for deed; assignment of bond without husband's concurrence; subsequent abandonment; innocent purchaser from assignee.

Lunt et al. v. Neeley et al.

ment to Payne was made. It therefore retained the homestead character at that time, and her act in assigning the contract was as ineffective to change that character as the former act of abandonment by the husband had been. Her subsequent removal to Colorado, and the conduct of herself and husband while there, and after their return to Perry, indicate an intention by both to abandon the homestead. But such abandonment was subsequent to the assignment, and, as that act was invalid at the time of its execution, it was not validated by the subsequent abandonment of the property. *Bruner v. Bateman*, 66 Iowa, 488.

II. It does not follow, however, that the subsequent purchasers of the property acquired no interest in it which they can assert against the plaintiffs. If C. R. Warren is in the position of an innocent purchaser, he is entitled to be protected against the claim urged by them, notwithstanding the invalidity of the sale and assignment by Mrs. Lunt. The bond and assignment to Payne were of record at the time he made the purchase from Mrs. Payne. The record of these instruments imparted no notice of a homestead right in favor of the Lunts in the property; and there was nothing in any of the conveyances constituting the chain of title which indicated the existence of such right; and they were not in possession, or in any manner asserting the right. He purchased from one who was in possession of the property, and who appeared by the record to have a perfect title to it, and he had no actual notice either of the claim now asserted by plaintiffs nor of the fact on which it is based. He is clearly an innocent purchaser of the property, and as such should be protected.

III. Plaintiffs contend, however, that C. R. Warren is charged with notice of the facts which were known to his agent who purchased the property for him. The knowledge of these facts, however, was acquired by Mrs. Warren more than a year before the purchase, and while she was negotiating for the

2. PRINCIPAL
and agent:
notice to
agent: how
far binding on
principal.

 Russell v. French, Circuit Judge.

purchase of the property for herself, and it is not shown that it was present in her mind at the time she made the purchase for C. R. Warren. Notice of the facts cannot be imputed to him under these circumstances. *Yerger v. Barz*, 56 Iowa, 77.

The judgment of the district court will be

AFFIRMED.

 RUSSELL V. FRENCH, CIRCUIT JUDGE.

1. **Contempt: BY ATTORNEY IN PRESENCE OF COURT: FACTS CONSTITUTING.** Where a contention arose between counsel as to whether a witness had not already answered a certain question, and the court, after hearing the reporter's notes read, decided that she had answered it, whereupon one of the attorneys sprang to his feet, and, turning to the court, said, in loud tones and insulting manner: "She has not answered the question," held that the attorney was guilty of contempt, regardless of the question whether the decision of the court was right or wrong. Code, § 3491.
2. —: **RIGHT OF OFFENDER TO MAKE VERIFIED EXPLANATION.** One charged with contempt, even when committed in the presence of the court, has the right to file a written explanation of his conduct under oath, for the purpose of excusing the contempt or reducing the punishment, (Code, § 3496,) and a reasonable opportunity must be given for this purpose before punishment is inflicted. For a failure to give such opportunity in this case, the judgment of the court imposing a fine upon plaintiff for a contempt is reversed.

WEDNESDAY, OCTOBER 7.

CERTIORARI. The plaintiff is a practicing attorney, and was fined by the defendant for a contempt of court. He claims that the court exceeded its jurisdiction or otherwise acted illegally in thus punishing him, and he seeks in this proceeding to have the judgment of the court set aside.

J. Scott Richman and *W. F. Brannan*, for plaintiff.

J. Carskaddan, for defendant.

67	102
114	159

67	102
124	189

67	102
126	349

 Russell v. French, Circuit Judge.

SEEVERS, J.—A cause was being tried in the circuit court, in which plaintiff was acting as one of the attorneys for one of the parties. During the progress of the trial the plaintiff asked a witness a question, to which objection was made by the attorneys for the plaintiff that the question had been already answered, and thereupon the court, after hearing the prior questions and answers read by the short-hand reporter engaged in taking the evidence, announced his decision sustaining the objection, and stating that the question had been already answered. Immediately upon this ruling the said J. J. Russell sprang to his feet, and, turning to the court, said, in loud tones and insulting manner: "She has not answered the question." Whereupon the court then and there fined the said Russell the sum of \$50 on account of contempt of court thus committed in the presence of the court, and known to the court of its own knowledge, and judgment was accordingly entered.

The plaintiff insists that the foregoing record made by the court at the time, as provided in section 3497 of the Code, is not full and complete, and does not state the facts correctly, and he has caused to be filed certain affidavits, statements and depositions which, he insists, support the claim made. Counsel for the defendant insist that these papers cannot be considered, and should be stricken from the record. We do not deem it necessary to determine this question, but will hereafter refer to the affidavits and depositions so far as deemed necessary.

I. It is provided by statute that "contemptuous or insolent behavior towards a court while engaged in the discharge of a judicial duty, which may tend to impair the respect due to its authority," is a contempt. Code, § 3491. When the court made the ruling it did, whether right or wrong, the plaintiff should either have submitted thereto, taken an exception, and had the error, if it was one, corrected on appeal, or in respectful language and manner addressed the court and asked to

1. CONTEMPT:
by attorney in
presence of
court: facts
constituting.

have the ruling reconsidered; but if the court declined to hear him, the plaintiff should have acquiesced therein. The time for argument is before the decision. Counsel then have the right to insist on being heard. When a decision has been made, the time for argument has passed, unless permission of the court is asked and obtained. Of course, it will be understood, if the right to a rehearing exists and is asked, the right to make an argument would seem to be apparent; but even in such case the court in its discretion might decline to hear the argument. Instead of taking this course, or one approximating thereto, the plaintiff, as the court thought, in "loud tones and insulting manner," directly contradicted a statement of fact made by the court, and upon which the decision was based. We therefore feel constrained to say that such conduct was contemptuous, and had a tendency to impair the respect due to the authority of the court. If the plaintiff believed the statement made by the court to be incorrect, and he deemed it material for the interest of his client to have it corrected, and the decision changed, he should, in respectful language, have called attention to what he deemed to be the mistake. It is quite apparent that he did not do this, but that, at least, he sprang to his feet and, in unequivocal language, directly contradicted what the court said.

Whether the plaintiff's manner was insulting we are unable to say; but that we must assume it to have been so we have no doubt. The plaintiff, as we understand, claims that he in point of fact was right and the court wrong; the contention of the plaintiff being that the question asked the witness had been evasively and not directly answered; and he seeks to so show by the affidavits filed by him. We think it is immaterial how this may be. Conceding that he is correct in this respect, still we do not think he was justified in addressing the court as he did. We have examined the affidavits and depositions on file, and are unable to see that the record made by the court has been shown, conceding the compe-

 Russell v. French, Circuit Judge.

tency of such evidence, to be incorrect in any material statement of fact.

II. The statute provides that, "unless the contempt is committed in the immediate view and presence of the court, * * * an affidavit showing the 2. —: right of offender to make verified explanation. nature of the transaction is necessary as a basis for further action in the premises. Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath." Code, § § 3495, 3496.

This statute contemplates that contempts may be committed when the offender is in the presence of the court, and when he is not. But, however committed, he has the right to make a written explanation of his conduct under oath, for the purpose of excusing the contempt or reducing the punishment; and a reasonable opportunity must be given for this purpose before punishment is inflicted. After a person has been adjudged guilty of contempt, and punishment inflicted, he has no right to excuse or explain his conduct except with the consent of the court, and possibly at its invitation. That such is the common law rule we think must be conceded. The statute has changed this rule, and under it the offender, when accused of contemptuous conduct, has the absolute right to make an explanation, provided he does so in respectful language. Now, as we understand the record, no such opportunity was given. The court adjudged the defendant guilty and inflicted punishment, so to speak, in the same breath. There was no time when he could have exercised the right given him by statute. The right is not a barren one, but is of a substantial character, and a person cannot be deprived of it by an expeditious mode of inflicting punishment. We cannot but think that, when a court deems that a contempt

Hayden & Co. v. Goppinger et al.

of its authority has been committed, the attention of the accused should be called thereto, and a reasonable time fixed within which he may make the written explanation contemplated by the statute. It is obvious that he should not be required to do so on the instant the accusation is made, unless the emergency is more than ordinarily great. Ordinarily there cannot be any necessity for haste; on the contrary, deliberation in such cases may be exceedingly advantageous. The result is that the court exceeded its authority in imposing a fine on the plaintiff, and entering judgment therefor, and such judgment must be set aside.

REVERSED.

HAYDEN & Co. v. GOPPINGER ET AL.

1. **Judgment: LIEN ON BUILDING ERECTED ON LEASED LAND: SUBSEQUENT MORTGAGE OF BUILDING: PRIORITY OF LIEN.** A building erected by a tenant on leased land, which cannot be removed by him, becomes attached to the leasehold, and a judgment against the tenant becomes a lien on the building and leasehold, superior to the lien of a subsequent mortgage of the building as a chattel. Whether the same rule would obtain in case the building was erected for the purpose of trade, subject to removal by the tenant, is not decided; but compare *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537, and *Walton v. Wray*, 54 Id., 531.
2. **Pleading Conclusion of Law: NO OBJECTION: RESULT.** The allegation that a certain judgment is a lien on certain property, though a conclusion of law, is sufficient, until objected to, to show *prima facie* the right to enforce the alleged lien.

Appeal from Hamilton District Court.

WEDNESDAY, OCTOBER 7.

ACTION to enforce the lien of a judgment. A demurrer to the petition was sustained; and, plaintiffs standing upon their petition, the action was dismissed. They now appeal.

Chase & Chase and *W. J. Covil*, for appellants.

Kamrar & Boeye, for appellee.

BECK, CH. J.—I. The petition alleges that plaintiff recovered a valid judgment against one Floyd; that subsequently Floyd executed a chattel mortgage to defendants Goppinger, on a building situated upon certain lots in Webster City, to secure the payment of a promissory note executed by him; and that Floyd has since died, and the Goppingers have caused their mortgage to be foreclosed, and are about to sell the building upon a decree of foreclosure. The petition contains a further allegation in the following language: "That said building was built by said Floyd on the lots in question, under a lease for a term of years, and plaintiffs' judgment was a lien on said leasehold and building, prior to the execution of mortgage under which said Goppingers claim, and their interest is inferior and subject to the lien and claim of plaintiff." The defendants demurred to the petition on the ground that it shows that the building was personal property when the judgment of plaintiffs was rendered, and continues to be property of that character. The demurrer was sustained. Of this ruling plaintiffs now complain.

II. Counsel have directed their attention in argument to the questions whether a building erected upon leasehold land is personal property, and whether the building involved in the case became a part of the leasehold property, and was held as such by the tenant. It would appear that a building upon leasehold property, with the right of the tenant to remove it at the end of the term, is, with the interest of the tenant in the land, subject to the lien of a judgment rendered against the tenant, which is paramount to subsequent conveyances by the tenant. *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537. And it may be that buildings erected for the purpose of trade, subject to removal by the

1. JUDGMENT:
lien on building
erected
on leased
land: subsequent
mortgage of building;
priority
of lien.

tenant, are to be regarded as personal property, and do not become a part of the leased premises. See *Walton v. Wray*, 54 Iowa, 531. But it cannot be doubted that a building erected by the tenant, which cannot be moved by him, becomes attached to the leased premises, and is subject to the same rules, as to liens and conveyances, which apply to the estate and interest of the tenant in the land. That a judgment against the tenant would be a lien upon his interest and estate in the land is settled by *First Nat. Bank Davenport v. Bennett*, *supra*. In this case the petition does not show whether the building was erected for the purpose of trade and could have been removed by the tenant, or whether it could not have been removed. Nothing is alleged as to the rights of the parties in this regard.

III. But the petition does allege that the judgment was a lien upon the building. This allegation is not objected to as being of a conclusion of law, nor was plaintiff required, to state more specifically his title to and interest in the building, and the facts upon which he bases his claim for a lien thereon. While the petition in this respect may be faulty, yet, until complained of upon this ground, it must be regarded as alleging the existence of the lien, and there is nothing contained in it which shows the contrary. In our opinion it shows *prima facie* plaintiff's right to enforce a lien upon the building.

We reach the conclusion that the district court ought to have overruled the demurrer.

REVERSED.

2. PLEADING
conclusion of
law: no ob-
jection: re-
sult.

SMITH ET AL. V. HINTRAGER.

1. **Malicious Prosecution of Civil Action:** RECOVERY FOR: RULE STATED. There can be no recovery for the malicious prosecution of a civil action unless the defendants in such action have suffered by reason thereof some loss, annoyance or inconvenience which may not be regarded as incident to every civil action. *Wetmore v. Mellinger*, 64 Iowa, 741, followed.

Appeal from Dubuque District Court.

WEDNESDAY, OCTOBER 7.

ACTION for malicious prosecution. The defendant demurred to the plaintiffs' petition, and the demurrer was sustained. The plaintiffs electing to stand upon their petition, judgment was rendered against them for costs. They appeal.

M. H. Beach, for appellants.

Powers & Lacy, for appellee.

ADAMS, J.—The action for the malicious prosecution of which this action was brought was an action in equity, brought by this defendant against these plaintiffs, to quiet title to certain land of which this defendant claimed to be the holder of a tax deed. The action never came to a hearing, but was dismissed. It is not averred that these plaintiffs suffered in that action any loss, annoyance or inconvenience, except such as may be regarded as incident to every civil action and, such being the fact, it appears to us that the plaintiffs failed to state a cause of action. *Wetmore v. Mellinger*, 64 Iowa, 741.

AFFIRMED.

67	110
79	191

IN RE ESTATE OF DENNIS.

1. **Estates of Decedents: ALLOWANCE TO WIDOW AND CLAIM AGAINST ESTATE: PRIORITY.** An allowance made by the court to the widow of a decedent, under Code, § 2375, unless modified by the provisions of Code, § 2377, must be paid in preference to a claim of a creditor of the decedent, filed and allowed as a claim against the estate; and the administrator has no power to contract with a creditor that his claim shall have preference; nor has the court power, upon the allowance of such claim, to order that it shall be paid first.

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 7.

THE facts are stated in the opinion.

Barcroft & Bowen, for appellants.

Finkbine & McClelland, for appellee.

SEEVERS, J.—In April, 1884, C. D. Reinking was appointed administrator of the estate of S. E. Dennis. A few days thereafter the defendant, O. J. Dennis, the widow of the deceased, made an application to the circuit court for an allowance for her support for twelve months, and the following order was made in relation thereto: "The administrator is authorized to pay to the widow \$20, out of the funds in his hands, per month for each month from the death of S. E. Dennis until further order of this court." A few days afterwards S. A. Robertson filed a claim against the estate, and in November following the claim was allowed, and the administrator was directed to pay said claim in full out of any funds in his hands belonging to the estate. In relation to this claim the court made a finding of facts, the material portions of which are that Dennis in his life-time contracted with the Rev. A. L. Frisbie for the construction of a church, and he contracted with Robertson to furnish certain mate-

 In re Estate of Dennis.

rials for, and perform labor in, the construction of such building, and by reason thereof Dennis, at his death, was indebted to Robertson. Frisbie was also indebted to Dennis for the construction of the church. The administrator, Robertson and Frisbie met for the purpose of adjusting the indebtedness. The administrator represented that the estate was solvent, and that the claim would be paid in full, and further stated that he "desired Robertson not to file a mechanic's lien against the building, * * * as the same would create unnecessary expense, * * * and that there was no necessity therefor." Because of said representations Robertson abandoned his intention of filing a mechanic's lien against the building, but filed his claim against the estate.

At the time of making the representations the administrator believed the estate was solvent, but, in fact, it was insolvent, and there are not sufficient funds in the hands of the administrator to pay the allowance made the widow and the amount allowed Robertson; besides which, there are other claims against the estate which have been filed and allowed. Frisbie paid the administrator the amount due Dennis under the contract. In January, 1885, Mrs. Dennis stated to the court that the administrator refused to pay a portion of the allowance made to her, and asked an order requiring him to do so. As an excuse for not paying the allowance made the widow, the administrator set up the allowance made Robertson, and, as he did not have funds to pay both in full, he asked the court to order which should be first paid. The court ordered that the allowance made Robertson should first be paid in full, and the administrator and widow both appeal.

The statute provides that the court shall, if necessary, set off to the widow * * * of the decedent *
 * * sufficient of his property of such kind as it shall deem appropriate to support her for twelve months from the time of his death. Code, § 2375. Acting under

this statute, the allowance to the widow was made. The statute further provides that the court may, on the petition of the widow or other person interested, review such allowance, and increase or diminish the same. Code, § 2377. No such application was made, and the amount allowed the widow was not in any respect changed. Its payment was simply postponed, or rather the amount allowed Robertson was directed to be first paid, because of its superior equity, as the court thought. The statute further provides that, after paying the expenses of administration, charges of the last sickness, and funeral of the deceased, the administrator shall in the next place pay any allowance which may be made by the court for the maintenance of the widow. Code, §§ 2418, 2419. The payment of such allowance, under the statute, must be made prior to taxes or any other claims against the estate, except as above provided. Code, § 2420. This being so, we think the court erred in ordering that the allowance made Robertson should be first paid. It was not in the power of the administrator, by any agreement, representation or contract which he might make with a creditor, to deprive the widow of the priority given her by statute. Robertson had no lien on the money paid the administrator by Frisbie, simply for the reason that the administrator had no power to create a lien to the prejudice of the widow. The authorities cited by counsel for the appellee are *Burroughs v. McLain*, 37 Iowa, 189; *Baldwin v. Dougherty*, 39 Id., 50; and *Hadley v. Gregory*, 57 Id., 157; but they are not applicable, and the question before us must be determined by reference to the statute and its proper construction.

REVERSED.

THE IOWA LOAN AND TRUST CO. V. MOWERY ET AL.

67	113
108	148
67	113
114	654

1. **Vendor and Vendee: SALE OF PART OF TRACT SUBJECT TO MORTGAGE ON WHOLE: ATTACHMENT OF VENDEE'S INTEREST: PRIORITY.** A tract of land was incumbered with two mortgages, and the owners sold and conveyed a portion of it to F. by warranty deed, excepting, however, the two mortgages from the covenant of warranty, and reciting that the land was sold subject to the mortgages. F. orally agreed to pay the mortgages, and the amount due thereon was recited as a part of the consideration for the land. The mortgages and the deed were of record. Afterwards the land so conveyed was attached as the property of F., but the attaching creditors had no notice of F.'s oral agreement to pay the mortgages. *Held* that the papers of record were sufficient notice that the land at least was charged with the whole of the mortgage debts, and that F.'s grantors were entitled, as against the attaching creditors, in an action to foreclose the mortgages, to a decree that the land so sold to F. should first be exhausted in payment of the mortgage debts, before the other land covered by the mortgages, and still held by them, should be sold for that purpose.

Appeal from Jasper Circuit Court.

WEDNESDAY, OCTOBER 7.

ACTION to foreclose mortgages. The decree provides that separate tracts of land mortgaged shall be charged with the mortgage debt in the proportions indicated therein. Two of the defendants, John E. Mowery and Henry Kline, appeal.

Winslow & Varnum, for appellants.

Cook & Clements, for appellees.

BECK, CH. J.—I. The facts of the case, briefly stated, are these: The defendants Mowery and Kline purchased the land of the mortgagor after the execution of the mortgage to another, and still later sold and conveyed a part of the land to Framel, by a deed which excepted from the operations of the covenant of warranty the two mortgages, and in its recitations declared that the land is sold subject to the

mortgages. Framel agreed orally to pay the mortgages, and the amount due thereon was recited as a part of the consideration of the land. The defendants, the Jasper County Bank, and the assignor of S. E. Cook, another defendant, instituted attachment proceedings against Framel after the land was conveyed to him, and they hold deeds executed by the sheriff under sales had upon the judgments rendered in the proceedings. They had no express notice of the oral agreement of Framel to pay the mortgages as a part of the consideration of the land. The deeds and mortgages hereinbefore referred to were all duly recorded.

II. The defendants Mowery and Kline, who appeal, insist that the land conveyed to Framel should first be charged with the whole mortgage debt, and the lands not conveyed by them should not be sold except to discharge whatever part of the mortgage debt remains unpaid after the application thereon of the sum realized from the sale of the other land. The decree provides that the debt shall be charged against each tract in the proportions therein stated. We think the decree is wrong, and that it should have provided for the sale of the land conveyed to Framel first, and that the other land should only be sold to make up the amount of the mortgage debt then remaining unpaid. Our conclusions are based upon these grounds: Had Framel continued to own the land purchased by him, it cannot be disputed that the rule we have stated should have been applied. Counsel for appellees, in their argument, admit this proposition. But they insist that, as the creditors holding the land under the sheriffs' deeds had no notice of the oral agreement of Framel to pay the mortgage, they cannot be bound by it, nor their rights made to conform to it. The deed to Framel, by its recitations, shows that the mortgage debt was unpaid, and that his grantors were not liable to him for it. This deed and the mortgages show that the land in question is bound by the mortgages for the whole debt, and that appellants are not liable to Framel therefor. The case is this: Framel

Johnson v. Shank.

accepts a conveyance of the land, releasing his grantors from all obligation to pay the mortgages thereon. These facts surely show an agreement on the part of Framel that the lands bought by him shall be subject to the whole mortgage debt. While the agreement thus shown does not bind him personally to pay the debt, it does show that he agreed that his property should be bound for the debt without recourse by him upon his grantors. This is nothing more or less than an agreement by him to pay the mortgage debt, without personal responsibility therefor. Of this agreement the holders of the title under the sheriff's sale had notice, for it is, as we have pointed out, found in the recitals of a deed under which they claim title. We are clearly of the opinion that these persons hold their title to the land with notice of Framel's agreement, and that they have no rights other or different from those he held. Our conclusions are based upon familiar principles of the law, which need not be supported by authorities.

The decree of the circuit court is reversed, and the cause is remanded for a decree in harmony with this opinion, or, at appellants' option such a decree may be rendered in this court.

REVERSED.

JOHNSON V. SHANK.

1. **Landlord and Tenant: FIELD-CROPPER: SHARE OF CROPS FOR RENT: FAILURE TO DELIVER: MONEY JUDGMENT: DEMAND NECESSARY.** In March, 1882, plaintiff leased to defendant, as a "field-tenant or cropper," certain land to be planted to corn, he to have delivered to him as rent one-third of the corn raised. No time was fixed when the lease should terminate, nor when the corn should be delivered. On the fourth day of the following December, plaintiff sued defendant for a money judgment on account of corn not delivered, without having made any previous demand for the corn. *Held* that, although the lease terminated by operation of law (Code, § 2015) on the first day of Decem-

67	115
97	521
98	12
67	115
132	93

Johnson v. Shank.

ber, that provision of law did not amount to an agreement between the parties that the corn should then be delivered; and, in the absence of a stipulation on that point, plaintiff could not recover a money judgment without first having demanded the corn. Code, § 2097.

2. Practice in Supreme Court: COSTS OF UNNECESSARY ABSTRACT.

Where the record was fully and fairly presented by appellant's abstract, the costs made in preparing a useless amendment thereto by the appellee were taxed to him, though the judgment in his favor was affirmed.

Appeal from Guthrie Circuit Court.

WEDNESDAY, OCTOBER 7.

ACTION AT LAW FOR THE RECOVERY OF RENT. There was a verdict and judgment for the defendant. Plaintiff appeals.

Lyman Porter and Charles S. Fogg, for appellant.

E. W. Weeks, for appellee.

REED, J.—The evidence introduced by plaintiff on the trial proves the following facts: In March, 1882, plaintiff leased fifty acres of ground to defendant, which the latter agreed to cultivate in corn during the season of that year. He also agreed to pay, as rent for the land, one-third of the crop which he should raise thereon. The contract was in parol, and there was no express agreement as to the time when it should terminate, or when the rent should be paid. Defendant raised a crop of corn on the land, but had not finished gathering it when this suit was instituted, which was December 4, 1882. He had delivered a portion of the rent-corn, but plaintiff was entitled to about 500 bushels in addition to the amount so delivered. Defendant did not live on the premises, but was a "field-tenant or cropper." Plaintiff seeks to recover the money value of the corn which had not been delivered, but he made no demand for its delivery before instituting the suit. The circuit court ruled that he was not entitled to recover in the absence of such demand, and directed a verdict for the defendant.

The only question in the case is as to the correctness of this ruling. It is provided by statute (Code, § 2097) that "no contract for labor or for the payment or delivery of property, other than money, in which the time of performance is not fixed, can be converted into a money demand, until a demand of performance has been made, and the maker refuses, or a reasonable time is allowed for performance." The contract under which plaintiff claims to recover is a contract for the payment of property other than money, and if the time of performance is not fixed in it, plaintiff is clearly not entitled to recover as on a money demand, without having first demanded the delivery of the property. This is conceded by counsel for plaintiff; but they contend that the contract does fix the time of performance. Their position is that, by the provision of section 2015 of the Code, a lease like the one in question terminates on the first of December, and that, in the absence of any express stipulation as to the time when the rent shall be paid, it becomes due by implication of law on the termination of the lease, and that these provisions of the law entered into and became part of the contract, and hence it is as certainly provided by the contract that the rent should become due on the first of December as it would have been if an express stipulation to that effect had been embodied in it. We think, however, that the position is not sound. The effect of said section was doubtless to terminate the contract on that date. It provides, in effect, that the leases of field-tenants or croppers, when the crop raised by them is corn, shall terminate on the first of December, unless otherwise agreed upon. This provision, however, does not establish a rule for the government of parties in making their contract. It simply fixes a time at which, in the absence of express agreement to the contrary, the lease shall terminate. The lease in question terminated on that day, not because of any stipulation that it should terminate at that time, but because the parties had failed to agree that it should terminate on another date. The right to demand the payment of

McKindley, Gilchrist & Co. v. Nourse, Assignee, et al.

the rent on that day, which accrued in favor of plaintiff, arose, not because that day was fixed in the contract as the time of performance, but because the statute provided that the lease should then terminate. Undoubtedly the parties should be held to have contracted with reference to the statute. They did not, however, make its provisions part of the contract. They simply entered into no stipulation as to the time when it should terminate, but left it to be terminated by the statute.

We think the circuit court correctly held that the time of performance was not fixed in the contract.

Appellants filed a motion to tax the costs of printing appellee's amended abstract to him. This motion will be sustained. There was no occasion for filing an amended abstract. The record was fully and fairly abstracted by appellant.

The judgment will be

AFFIRMED.

67	118
78	484
67	118
82	29
67	118
94	446

McKINDLEY, GILCHRIST & Co. v. NOURSE, ASSIGNEE, ET AL.

- 1. Assignment for Benefit of Creditors: EXHIBITION OF CLAIM AGAINST ASSIGNEE: WHAT IS NOT: STATUTE OF LIMITATIONS: EQUITABLE RELIEF.** A creditor of an insolvent, who does not exhibit his claim within three months from the time of giving the notice of assignment required by § 2119 of the Code, cannot participate in the dividends until after the payment in full of all claims presented within that time and allowed by the court. (Code, § 2126.) And where plaintiffs had sold to the insolvent certain goods, which passed into the assignee's possession, but plaintiffs gave him notice that as to such goods they rescinded the sale, and demanded the goods, and, the demand being refused, they replevied them, but were defeated on the trial, *held* that such demand and suit did not constitute an exhibition of their claim within the meaning of the last named section, and that a claim filed for the same demand eighteen months after the giving of notice of the assignment was not entitled to participate in the first distribution of assets, and that plaintiffs could not demand equitable relief under § 2421 of the Code—that section having sole relation to claims against estates of decedent.

McKindley, Gilchrist & Co. v. Nourse, Assignee, et al.

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 7.

B. W. MORRISON made a general assignment for the benefit of his creditors, and this is a contest as to the division of the assets between them. The court determined that plaintiffs were entitled to a share of the estate, and the defendants appeal.

Nourse & Kauffman, for assignee.

Macy & Sweeney, for appealing creditors.

Wright, Cummins & Wright, for appellees.

SEEVERS, J.—The assignment was made on the twenty-third day of May, 1883, and the assignee mailed to the creditors notices of the assignment on the twenty-fifth of said month, and also caused a notice to be published in the *Iowa State Register* for six consecutive weeks, and made a report of his doings to the court on the twenty-seventh day of August, 1883, the first publication being made on May 26, 1883. Among the property assigned, and which went into the possession of the assignee, were certain goods purchased by Morrison of the plaintiffs, and on May 26, 1883, plaintiffs notified the assignee that, as to such goods, they rescinded the sale and demanded immediate possession thereof. The assignee refused to surrender the goods, and plaintiffs commenced an action to recover the same. This action was tried in October, 1884, and judgment was rendered against plaintiffs. On August 10, 1883, plaintiffs filed with the assignee a claim against the estate, and therein gave credit for the goods taken in the action for replevin. Upon this claim they have been paid their *pro rata* share. On the first day of December, 1884, plaintiffs filed a claim against the estate for the amount for which credit had been given when their

McKindley, Gilchrist & Co. v. Nourse, Assignee, et al.

previous claim was filed, the same being the value of the goods replevied, which the plaintiffs, in accordance with the judgment in the action of replevin, had paid the assignee.

This is the claim the payment of which is resisted. It does not distinctly appear, but we infer, that if no portion of this claim is paid the other creditors will not receive the full amount due them.

I. It will be observed that the claim under consideration was not filed within eighteen months after the first publication of notice by the assignee, and more than fifteen months had elapsed after the assignee made the report contemplated in section 2120 of the Code. It has been held that a claim so filed could not participate in the benefits of the assignment. *In re Holt*, 45 Iowa, 301. The appellees, however, contend that the commencement of the action of replevin, and the claim made in connection therewith, should be regarded as the exhibition of the claim required by section 2126 of the Code; the argument being that it is not required that claims should be filed with the assignee, but simply exhibited to him, to the end that he may be enabled to make the report required by statute. Conceding that the statute does not require the claim to be filed, but to be simply exhibited to the assignee, still it must be a claim against the estate; that is, it must be a claim or demand for a *pro rata* share of the proceeds of the estate, so that the assignee may make a proper report to the court for the purpose of forming a basis for the distribution of the estate. No such claim as this was exhibited to the assignee within the time required by law.

No demand was made on the assignee for payment. On the contrary, plaintiffs did not seek payment of the claim through the assignee or from the assignment. The validity of the assignment of the goods replevied was denied, and plaintiffs undertook to recover the whole value of the goods, instead of sharing with the other creditors. Having taken the chances, and, because of the choice made, failing to exhibit

 Wischert v. Dietz.

or file the claim within the time required by law, plaintiffs must abide the consequences.

II. The appellees further contend that, because of the equitable circumstances, the relief asked should be granted, and the rule in relation to filing claims against the estates of decedents is invoked. Such rule is based on an express statute which gives the creditor relief if equitable circumstances entitling him thereto are shown. Code, § 2421. No such provision is found in the statute in relation to assignments for the benefit of creditors, but a positive bar is created thereby if the claim is not exhibited to or filed with the assignee or court within the time provided. Code, § 2126.

We are of the opinion that the circuit court erred in granting the plaintiffs the relief it did.

REVERSED.

 WISEHART V. DIETZ.

67	121
140	672

1. **Practice in Supreme Court: REVIEWING RULINGS ON CHALLENGES TO JURORS: PRINCIPLES STATED.** When the trial court, by its ruling upon a challenge, compels a party to submit his cause to a juror who is prejudiced against him, he has good ground for complaint. But when the court *sustains* a challenge, and the adverse party goes to trial with a jury formed without his exhausting the peremptory challenges allowed him by the law, this court ought to be well satisfied that the challenge was sustained without any cause, in order to justify a reversal on that ground; and the record in this case (see opinion) does not show that the challenge complained of may not have been sustained for a sufficient cause.
2. **Contract: COMMISSION FOR SALE OF LAND: DUTY OF OWNER TO MAKE CLEAR TITLE.** Defendant employed plaintiff to negotiate a sale of real estate,—plaintiff to have for his services all realized over \$25,000. He sold the real estate for \$26,000, but a portion of it was incumbered by a lease which it took \$300 to remove. *Held* that, in the absence of a special agreement in relation thereto, it was defendant's duty, at his own cost, to convey the property free of incumbrance, and that he could not insist that the \$300 should be deducted from the plaintiff's \$1,000;

 Wisehart v. Dietz.

and that the fact that the deeds were made containing this clause: "It is understood and intended merely to sell and convey the ground only, exclusive of improvements; and subject to the rights of the owners of the improvements therein,"—did not show an intention or understanding that plaintiff should discharge the said lease out of his share of the proceeds.

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 7.

THIS is an action at law in which the plaintiff claims of the defendant a balance of \$300, which he alleges is due him as compensation for effecting sales of certain real estate for the defendant. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

Gatch & Weaver and *W. F. Conrad*, for appellant.

Phillips & Day, for appellee.

ROTHROCK, J.—I. The first assignment of error presented in argument is that the court erred in sustaining a challenge for cause interposed by the plaintiff to one of the persons called as jurors on the trial of the cause. The person challenged belonged to the regular panel, and, in answer to questions touching his competency as a juror, he stated that his son was married to the defendant's daughter. Objection was made to the challenge by the defendant, and the challenge was sustained. Other persons were afterwards called as talesmen, and neither party exercised his right of peremptory challenge to the full number allowed by law, and the jury so completed was accepted by the parties, and sworn to try the cause.

The grounds for challenges of jurors for cause are set forth in section 2772 of the Code. Sub-division 4 of that section provides that "consanguinity or affinity within the ninth degree to the party" shall be sufficient to support a challenge for cause. It is not claimed by counsel for appellee

1. PRACTICE
in supreme
court: review-
ing rulings on
challenges to
jurors: prin-
ciples stated.

that the juror in question was related to the defendant within the degree prescribed by the statute; and we cannot presume, in the absence of an express ruling made of record, that the court sustained the challenge upon this specific ground. If such was the fact, it was plainly erroneous. A juror may, however, be challenged for cause "when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict." Now, for aught that appears from the record before us, the court may have had sufficient reason for sustaining the challenge because of the state of mind of the juror, growing out of the fact that the defendant was the father of the juror's son's wife. It does not appear what the questions were which were propounded to the juror. The abstract merely states that, in answer to questions propounded to him by plaintiff, he stated that his son was married to defendant's daughter. The question is quite different, when a challenge is sustained and another unobjectionable juror is substituted, from what it would be if a challenge for cause should be erroneously overruled. The law aims to provide for parties litigant an honest, fair-minded and unprejudiced jury. When the court, by its ruling upon a challenge, compels a party to submit his cause to a juror who is prejudiced against him, he has good ground for complaint. On the other hand, when a party is provided with twelve men to try his cause, and he fails to exercise the right of peremptory challenge to any of them, this court ought to be well satisfied that a challenge was sustained without any cause, in order to justify a reversal on that ground. In view of the relations existing between the families of the defendant and the juror, we think the defendant ought not to be allowed to claim prejudice because he was not permitted to retain the juror as one of the triers of his cause.

II. The defendant was the owner of valuable real estate in the city of Des Moines, which he desired to sell. The

2. CONTRACT: plaintiff was engaged in the real estate business.
commission for sale of land: duty of owner to make clear title. A contract was made between the parties, by which the defendant authorized the plaintiff to sell the real estate, and plaintiff was to receive as his commission for making the sale all that he could realize from the property exceeding \$25,000. In other words, the defendant was to receive \$25,000 for the property, and the plaintiff was to have whatever he could make out of it in excess of that amount. The plaintiff negotiated sales, all at one time, but to different parties, and the aggregate amount of the sales was \$26,000. There were leases upon the property, and the lessees had improved the same. All of these leases had expired except that of one Garton, who was one of the purchasers. Garton refused to complete his purchase unless he was allowed to deduct \$300 on account of his lease. The question in the case is whether this \$300 shall be deducted from the plaintiff's commissions, or whether the defendant shall pay it to the plaintiff. The defendant received the full sum of \$25,000, and plaintiff has received \$700, by the contract between the parties. When the defendant authorized the plaintiff to make the sale, the defendant was bound to deliver possession of the property clear of claims for unexpired leases. The defendant claims, however, that after the sales were negotiated it was agreed between the parties that the plaintiff should adjust the claim of Garton on account of the unexpired lease out of any excess over the \$25,000 for which he might sell the property. This alleged subsequent agreement was denied by the plaintiff. The court instructed the jury that, if they found that such subsequent agreement was entered into, the plaintiff could not recover. The jury was further instructed as follows: "(2) If you fail to find that there was such subsequent agreement, then the rights of the parties are to be measured by the one first entered into between them. An agreement to sell, or giving authority to another to sell, implies that complete title and full possession will be given, unless it is agreed to

the contrary. So that, if the agreement was that the plaintiff should have as compensation whatever he might realize for the property in excess of twenty-five thousand dollars, and nothing was said as to the incumbrances, then the defendant would be bound to remove the incumbrances. You are to enforce the mutual understanding of the parties, and, to arrive at that, you will take into consideration all the surrounding circumstances as known to the parties, and what was said between them, and say therefrom whether it was understood in the first agreement that the plaintiff was to be at the expense of removing the Garton lease. If not, and the rights of parties are to be measured by the first contract, then the plaintiff will be entitled to recover the three hundred dollars, with interest at six per cent from May 11, 1883."

Counsel for the defendants insist that this instruction is erroneous in directing the jury "that if the agreement was that the plaintiff should have as compensation whatever he might realize for the property in excess of twenty-five thousand dollars, and nothing was said as to the incumbrances, then the defendant would be bound to remove the incumbrances."

It is claimed that the question of incumbrances was discussed between the parties, and that the instruction is misleading, because it authorized the jury to find that nothing was said about incumbrances. Counsel has reference to what was said between the parties after the sales were negotiated, and at the time defendant claims the second contract was made. In the instruction above set out the court gives directions to the jury as to the rights of the parties under the first contract. We think the instruction was strictly correct.

III. The deeds made by the defendant to the purchasers of the property contained this clause: "It is understood and intended merely to sell and convey the
THE SAME. ground only, exclusive of improvements, and

Wisehart v. Dietz.

subject to all the rights of the owners of the improvements thereon."

The court, at the request of the plaintiff, instructed the jury as follows: "The condition incorporated in the deed, that 'it is understood and intended merely to sell and convey the ground only, exclusive of improvements, and subject to all rights of the owners of the improvements thereon,' in no manner affects the leases, but simply preserves to the owners of the improvements their interest therein, and the right to remove them." The defendant claims that this clause was inserted in the deeds by an agreement between him and the plaintiff, and that its purpose was to release defendant from all incumbrances on the land, including the improvements and the right to remove them, and the right to compensation for unexpired leases. Whatever construction might be put upon this clause as between the grantor and grantees in the deeds, we think it is very clear that, as between the plaintiff and the defendant, in view of the evidence in the case, it should not be held as in any manner affecting the plaintiff's right to his commission. The clause does not refer to the matter then in controversy between the parties, that is, the Garton lease, and which of the parties should lose the \$300, which he insisted should be deducted from what he had agreed to pay for the part purchased by him.

IV. It is contended that the verdict is not supported by the evidence. We do not think the point is well taken.

AFFIRMED.

HARDIN COUNTY V. WRIGHT COUNTY.

67	197
108	505
67	127
1129	58
67	127
141	481

1. **Paupers: DUTY AND DISCRETION OF TOWNSHIP TRUSTEES IN GRANTING RELIEF: LIABILITY OF COUNTY OF RESIDENCE.** The duty of township trustees, when applied to by poor persons for relief, is not to be determined by very rigid rules. They must, in the exercise of a wise discretion, grant relief where they judge that humanity requires it; and they must often act promptly, and without taking time to make an extensive examination of the applicant's circumstances; and where they act in good faith, and without the abuse of discretion, their action is not subject to review. (*Armstrong v. Tama County*, 34 Iowa, 309.) And so, in this case, where the trustees of one of the townships of the plaintiff county in good faith granted relief, at the county's expense, to a man and family who had a settlement in the defendant county, *held* that the defendant county could not avoid liability for the same on the ground that the man had not a pauper record at the time of his removal to the plaintiff county, and that he had some property at the time the relief was given.

Appeal from Wright Circuit Court.

WEDNESDAY, OCTOBER 7.

ACTION to recover from the defendant for relief furnished by the plaintiff to an alleged pauper, G. L. Hutchinson, and his family. There was a trial to the court, and judgment was rendered for the defendant. The plaintiff appeals.

S. M. Weaver, for appellant.

Nagle & Birdsall, for appellee.

ADAMS, J.—Several questions are presented, but it will not be necessary to consider all of them. The record contains the findings of fact and conclusions of law of the court below, and the plaintiff contends that, taken together, they show that the court misconceived the true rule of law as applicable to the case. The findings of the court below are as follows:

“(1) I find that immediately prior to April 1, 1876, G. L. Hutchinson and family, consisting of a wife and six children, had a settlement in Wright county; (2) that about

April 1, 1876, he removed with his family and settled in Iowa Falls, Hardin township, Hardin county, Iowa, and engaged in the livery business; (3) that about September 1, 1876, Hutchinson and several members of his family were taken sick, and made application for relief to the trustees of the township where they resided; (4) that on such application relief was extended to the family, and that the account stated by the plaintiff is correct and the charges reasonable; (5) that the sickness of the family was of a serious character, and removal impracticable until about March 1, 1877; (6) that on or about December 24, 1876, notice was given by the trustees of Hardin township to the auditor of Wright county that the family was a public charge and was being relieved at public expense, and demand was made for removal and support, to which the authorities of Wright county gave an unconditional refusal, and repudiated all claims of Hardin county arising out of such support; (7) that subsequently, and before the commencement of this suit, the plaintiff's claim was duly presented to the board of supervisors of Wright county, and payment was demanded and refused; (8) I find that at the time of the removal of the family from Wright county Hutchinson, the father and head of the family, was worth about \$20,000, [probably erroneously written for \$2,000.] and prior thereto had always provided for himself and family, and that neither he nor any member of his family had ever been a public charge; (9) I find that at and during the time relief was being extended he had property not exempt from execution to the amount of \$1,000, a portion of which had been secreted so that it would have been difficult to discover it; (10) I am persuaded from the evidence that the township trustees, at the time the relief was extended, acted in good faith, and under the belief that the family were in such a state of want as required relief at public expense; but I find as a fact that they were not in such a state of want, for that they had property which might have been subjected to their support.

"From the above facts I conclude as follows: That a person without a pauper record, who moves from one county to another, with property sufficient for a reasonable support for himself and family, and engages in business, and is, after such removal, overtaken by sickness or other misfortune, is not within the class of poor which the statute contemplates may be relieved at the expense of the county from which he has removed; and in this particular case no such necessity arose as would justify an expenditure for support at the expense of Wright county."

The court seems to have attached great importance to Hutchinson's condition at the time he removed from Wright county. The idea of the court manifestly was that Wright county was not chargeable for support furnished after the removal, unless Hutchinson had a pauper record prior to his removal, or, at least, was in needy circumstances at the time of his removal. But in our opinion it was entirely immaterial what Hutchinson's condition or record was or had been at the time of his removal. A poor person should not be allowed to suffer because there was a time in his previous history when he was not poor. The condition of a person who has never had anything but a pauper record is bad enough. Certainly we cannot hold that a person who has not always had a pauper record may be worse.

Possibly it was not the idea of the court that a person who removes from one county to another cannot become a proper subject for poor relief, unless he was such subject prior to his removal. We are inclined to think it was not, and that the idea of the court was that where a person removes from one county to another, and falls into a state of want, the county of his residence must furnish relief, but cannot look to the county of his settlement, unless it can show that the person relieved had a pauper record, or, at least, was in needy circumstances, prior to removal. But in our opinion there is no warrant for such a rule, and we do not understand the defendant's counsel as seriously contending that there is. The

position upon which they seem to rely is that Hutchinson's condition was not such as called for relief from the plaintiff, and that, the plaintiff having furnished relief in the absence of all obligation to furnish it, no obligation arose on the part of the defendant to reimburse the plaintiff. Undoubtedly, relief should not be furnished at public expense to a person who is not in such a state of want as to require relief; and, where application is made for relief, the township trustees should make a reasonable effort to ascertain the true condition of the applicant. But it does not follow that because the applicant may have some property his condition is not such as to require relief. Take the case at bar. Here was a large family, some of whom doubtless were helpless even in a state of health. The head of the family and several of the members were stricken down by a serious sickness, and sickness among them continued for six months. They had recently removed to the place where they were taken sick, and were probably among comparative strangers, and may have been without money or credit. The fact that they had a thousand dollars' worth of property somewhere in the world did not preclude the possibility that they were proper subjects of relief. Yet the finding of the court that they were not proper subjects seems to be based wholly upon the existence of this property. It is true that the court found that the property could have been subjected to their support; by which we understand the court to mean, not that it might be employed in their support as far as it might yield an income, as possibly it was, but that it might have been sold. But no one but Hutchinson had power to subject it by direct sale, and he was probably disqualified for business, and he and his family needed food, fuel, shelter and medical attendance at once. Any person who is prostrated by sickness in a strange community, and is without the necessities of life and without money, credit or friends, is a subject of poor relief, though in health he may be far from it.

The duty of township trustees, when applied to for poor

relief, is not to be determined by very rigid rules. They must, in the exercise of a wise discretion, grant relief where they judge that humanity requires it. They must, too, oftentimes act promptly, and without taking time to make an extensive examination of the applicant's circumstances. Where they act in good faith, or without abuse of discretion, their action, in our opinion, is not subject to review. *Poplin v. Hawke*, 8 N. H., 305; *Taunton v. Westport*, 12 Mass., 355; *Armstrong v. Tama Co.*, 34 Iowa, 309. While the last case is not quite parallel to this, the reasoning, we think, upon which the decision is based is applicable. The court below found that the trustees acted in good faith, and this finding is not overcome or neutralized by the finding that Hutchinson had property. We may assume that the board of supervisors of Hardin county approved of the relief furnished, as the county appears to have paid the bills. On one point the finding of facts appears to be deficient, and that is as to whether the defendant county was notified of the furnishing of support within a reasonable time, as the statute provides. The court found merely that the notice was given on the twenty-fourth day of December, 1876. It is not for us to say, as a matter of law, that that was within a reasonable time. We cannot, then, render judgment for the plaintiff upon the finding, notwithstanding we think that the court erred in rendering judgment for the defendant. The case, then, must be remanded for another trial.

REVERSED.

DALY V. THE W. W. KIMBALL CO.

1. **Evidence: PAROL TO VARY WRITING: DUTY OF COURT TO INTERPRET WRITING.** This action was founded upon a written contract (set out in the opinion) which shows an unconditional sale of a new piano to plaintiff, and the like sale of an old one by her to defendant, and an unequivocal agreement on her part to pay a certain sum of money in addition. *Held* that it was error to admit parol testimony to show that the sales were upon conditions not expressed in the written contract; and that it was the duty of the court to interpret the contract as written, and error to submit it to the jury for interpretation in the light of such oral testimony.
2. —: **OF VALUE: WITNESS MUST BE SHOWN TO BE COMPETENT.** A witness should not be allowed to state what in his judgment a certain article (a piano in this case) is worth, without first showing that he is acquainted with the value of such property in the market.

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 7.

PLAINTIFF brought this action to recover the value of a piano. She alleges in her petition that she entered into a contract with defendant for the exchange of a piano which she owned for another piano which defendant owned; that it was a condition of the contract that she should have a reasonable time after the delivery to her of defendant's instrument within which to test it, and that, if she was not satisfied with said instrument after testing it, but preferred to retain her own, defendant would take it back and return her piano to her, but, if she was satisfied with the instrument after testing it, she was to retain it, and pay defendant the difference in value between the two instruments; that in pursuance of this agreement defendant delivered said piano to her and took possession of her instrument, and removed the same from her premises; that afterwards, and after she had fairly tested the piano left with her, she notified defendant that she was not satisfied with it, and requested him to remove it and return

67	132
108	707
67	132
120	181
67	132
134	552

Daly v. The W. W. Kimball Co.

her instrument; that defendant did remove the piano which had been delivered to her under the contract, but has neglected and refused to return the instrument belonging to her, but has converted the same to its own use. Defendant denies that it made a contract with plaintiff for the exchange of pianos on the conditions alleged by her, and alleges that it made an unconditional sale of a piano to plaintiff for the price of \$375, and that it accepted from her an old piano at the price of \$125 in part payment of said sum; that, after the sale and delivery of said piano to plaintiff, she desired to exchange the same for another instrument, and that at her request it consented to make such exchange, and that after this exchange was consummated it consented to take back the second piano delivered to her and permit her to select a lower-priced instrument, and that, in compliance with this agreement, it did take said instrument away, and that it has at all times been ready and willing to deliver to her another instrument in place of the one so removed, but that she had neglected and refused to designate one which she was willing to accept. There was a verdict and judgment for plaintiff. Defendant appeals.

Callender & Smith, for appellant.

J. M. St. John, for appellee.

REED, J.—I. On the trial plaintiff introduced parol evidence which tended to prove that defendant delivered the piano which it first delivered to plaintiff, and received the old instrument from her, on the understanding that she should test the instrument which she received, and that, if she was satisfied with it after giving it a fair trial, she should keep it at the price agreed upon, which was \$375, and that defendant should retain the old piano at \$125, and credit that amount on the price of the new one; and that plaintiff should pay the balance of the price in monthly installments; but that, if she

1. EVIDENCE:
parol to vary
writing: duty
of court to
interpret
writing.

Daly v. The W. W. Kimball Co.

was not satisfied with it after such trial, she had the right to terminate the transaction and demand the return of the old instrument and the removal of the one delivered by defendant. Defendant introduced the following instrument in writing, which was signed by plaintiff and delivered to defendant at the time the contract was entered into:

“\$375

JUNE 2, 1883.

“For value received, I, the undersigned, * *
* promise to pay to the order of W. W. Kimball Company three hundred and seventy-five dollars, at its office in Chicago, Illinois, as follows: One hundred and twenty-five dollars in hand paid by one second-hand piano; fifteen dollars on the second day of July; and fifteen dollars on the second day of each following month until the whole amount is paid, with interest on each payment at the rate of 10 per cent per annum from the date hereof until paid, with exchange, and a reasonable attorney’s fee if this note is placed in the hands of an attorney for collection. To secure the payment of the sums of money in the foregoing note contracted to be paid, together with interest, exchange and attorney’s fees, as therein provided, the undersigned hereby mortgages to said W. W. Kimball Company one piano, made by Emerson, No 28445, style ‘3,’ being the property sold by W. W. Kimball Company to me, in part payment for which the foregoing note is given. * * *

After introducing this instrument, defendant moved the court to exclude said parol evidence on the ground that it tended to prove a different contract from the one evidenced by the written instrument, and was therefore incompetent. The court overruled this motion, and by his instructions he left it to the jury to determine what the agreement between the parties was, and directed them that, in determining that question, they should consider the written contract and all that was said and done by the parties in the dealings and transactions which are the subject of the action. In our opinion, these rulings are erroneous.

By the written contract, plaintiff bound herself unconditionally to pay \$375 for the piano which defendant had sold to her. It also contains an express agreement between the parties that the second-hand instrument should be taken by defendant as payment of \$125 of that amount. It evidences an unconditional sale of the new instrument to plaintiff and of the old one by her to defendant. The parol evidence tended to prove a different contract. Under the familiar elementary rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument, it should have been excluded, and the court, instead of submitting it to the jury to determine what the agreement was, should have determined the question by properly interpreting the instrument. 1 Greenl. Ev., §§ 275, 277; *American Emigrant Co. v. Clark*, 47 Iowa, 671.

II. A witness who was not shown to have any knowledge of the market value of such property was permitted, against defendant's objection, to testify that the piano which defendant received from plaintiff was in her judgment worth \$125. This evidence was incompetent. Defendant's liability, if it was liable at all, was for the fair market value of the piano. The opinions of witnesses who were shown to be acquainted with the value of such property in the market would be competent evidence to prove such value. There can be no presumption, however, in the absence of a showing, that a witness is competent to form a correct opinion on the subject; and, until some showing of competency is made, the opinion of the witness is not admissible.

For the errors here pointed out, the judgment of the circuit court will be

REVERSED.

2. —: of value: witness must be shown to be competent.

FARMER V. THE CENTRAL IOWA R'Y CO.

1. **Railroads: INJURY TO EMPLOYE BY EXPOSURE TO COLD: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE.** Plaintiff, under a "section boss," went on a hand car, with the "boss" and another man, on a very cold morning, to work on a distant part of the road. Plaintiff twice remarked that he believed his feet were freezing, and requested that the car be stopped and he be allowed to walk, but the requests were not made with that degree of earnestness and urgency with which men usually make known their wants when their personal safety depends on the thing wanted; and so the car was not stopped, though plaintiff had it in his power to stop it by the use of the brakes, and it would not have been an act of insubordination for him to do so. Besides, plaintiff might have availed himself of shelter and a fire after their arrival at their destination, but he did not do so, but proceeded to shovel snow till about 2 o'clock P. M., when he said that his feet were frozen, and he was taken home. By the freezing of his feet he was permanently injured. *Held* that the "boss" was not guilty of negligence for which the company was liable, but that plaintiff was guilty of contributory negligence, and could not recover.

Appeal from Keokuk District Court.

WEDNESDAY, OCTOBER 7.

ACTION to recover for personal injuries sustained by plaintiff, who was in the employment of defendant, through the negligence of a co-employee under whose direction he was working. There was a judgment upon a verdict for plaintiff. Defendant appeals.

J. H. Blair, A. C. Daly and G. D. Woodin, for appellant.

J. F. & W. R. Lacey, for appellee.

BECK, CH. J.—I. The plaintiff, being employed as a "section hand" by defendant, with another "section hand" and a "boss," for the purpose of cleaning snow from a portion of the track of the section of which they had the care, went upon a hand-car about three miles, in order to begin

the work of the day. The morning was excessively cold; the thermometer, according to plaintiff's testimony, being thirty-seven degrees below zero. Plaintiff voluntarily went upon the car; that is, it would not have been regarded as an act of insubordination had he refused to go. The workmen had not proceeded more than half the way when plaintiff complained that his feet were very cold, and he feared they were freezing, and expressed a wish to stop the car, which was running at about twelve miles per hour, that he might get off and walk. It appears that the "boss" made no reply, and it is not shown that he heard the request. Soon after a like request was made, to which the "boss" made an evasive reply, and with which he did not comply. In a few minutes, not exceeding ten, after the last request, the car was stopped. The "boss" and another man went into a "tank-house" for a time, where some shelter was afforded from the extreme cold. The plaintiff remained outside. In a short time the three proceeded to the work of shoveling snow at points on the track beyond the place at which they had stopped. They returned to the "tank-house" about two o'clock, and took their dinner at four. Plaintiff then informed the "boss" that his feet were frozen, and that he desired to go home. He was taken home upon the hand car, when it was found that his feet were severely frozen. He has suffered greatly from the injury, which is permanent. These facts appear in the testimony of plaintiff. Some of them are stated differently, or are disputed, in the evidence for defendant.

The testimony for defendant shows, and the facts are not disputed, that plaintiff could have stopped the car at any time by the use of the brake, and it would not have been regarded as an act of insubordination; and by the same evidence it appears that there was a stove in the "tank-house." There was no fire built in it when the men were there in the morning, but there was a fire in it when they took their dinners in the afternoon.

Farmer v. The Central Iowa R'y Co.

II. Assuming, for the purposes of the case, that defendant would be liable for negligence of the "boss," if any be shown, we are of the opinion that the evidence fails to show facts from which such negligence may be inferred. Had the "boss" been advised that plaintiff's safety required him to stop the car, it would doubtless have been negligence for him not to have done so. But we are clearly of the opinion that the "boss" could not have inferred from plaintiff's request that he was in imminent danger which could only be avoided by stopping the car. Plaintiff's request, according to his own testimony, was not made with the earnestness and urgency with which men usually make known their wants when their personal safety depends upon the thing wanted.

III. We think, too, that plaintiff failed to exercise proper care to avoid the injury; that in fact he contributed thereto by his own negligence. If it was necessary to have the car stopped for him to get off, it was in his own power to stop it. Ordinary prudence required him to do this. His failure to do it was negligence contributing to the injury. We think, too, that he failed to exercise proper care in not going into the "tank-house," and negligently exposed himself to the intense cold, when he could have had shelter and a fire. This negligence doubtless contributed to his injury, and he cannot recover therefor.

In our opinion the district court erred in failing to instruct the jury in accord with these views, and in overruling a motion for a new trial. Other questions discussed by counsel need not be considered.

REVERSED.

REPORTS
OF
Cases in Law and Equity
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,

AT
DUBUQUE, OCTOBER TERM, A. D. 1885,
IN THE THIRTY-NINTH YEAR OF THE STATE.

PRESENT:
HON. JOSEPH M. BECK, CHIEF JUSTICE.
" AUSTIN ADAMS, } JUDGES.
" WILLIAM H. SEEVERS,
" JOSEPH R. REED.
" JAMES H. ROTHROCK. }

FRANCE V. HAYNES ET AL.

1. **Chattel Mortgage:** SALE OF PROPERTY UNDER: COLLUSION AND FRAUD: ACCEPTANCE OF PROCEEDS BY OWNER: ESTOPPEL. Plaintiff sought to set aside the sale of a horse under a chattel mortgage, upon the ground of collusion between the mortgagee and the purchaser; but, it appearing that plaintiff had accepted the surplus of the proceeds of the sale, *held* that he was estopped from asserting that the sale was invalid.

Appeal from Page Circuit Court.

TUESDAY, OCTOBER 20.

France v. Haynes et al.

ACTION in equity to set aside a foreclosure of a chattel mortgage executed upon a horse by the plaintiff to the defendant Gillispie. The court dismissed the plaintiff's petition, and he appeals.

B. F. Todd and James McCabe, for appellant.

K. A. Pence and Clark & Parslow, for appellees.

ADAMS, J.—The horse was purchased by the defendant Haynes for \$655.75. This was enough to pay the debt and costs, and leave a balance of nearly \$500. The plaintiff was absent at the time of the sale. Upon returning and hearing of the sale he offered to pay Haynes the amount of his bid and \$100 more if he would relinquish the horse, but Haynes was unwilling to do it. The plaintiff then went to the sheriff, who held for him the balance of the proceeds of the sale, and received from him a part thereof, and directed a part to be paid to one Webster, who, we infer, was a debtor of the plaintiff, and was setting up some claim to the money by way of attachment. A few days later the plaintiff brought this action to set aside the sale, alleging a fraudulent collusion between Haynes and Gillispie, the mortgagee, and alleging also that the sale was irregularly and illegally made. The court below, without ruling expressly upon the questions of fraud and illegality, held that the plaintiff estopped himself from setting up the same by accepting the proceeds of the sale. The plaintiff denies that any estoppel arose from his acceptance of the money, because he says he had offered to pay Haynes the full amount of his bid and more, and accepted the money with the view of paying it to him if he would take it. He also says that at the time he accepted the money he did not have full knowledge of the facts which rendered the sale invalid.

We are well satisfied that neither Haynes nor Gillispie was guilty of any attempt to defraud the plaintiff. As to the

France v. Haynes et al.

alleged irregularities in making the sale, we have to say that the principal one seems to be that the property was not sold to the highest bidder, nor to the person to whom it was struck off, but was sold to the next highest bidder, whose bid was twenty-five cents less; the highest bidder not being able to pay for the property in accordance with the terms of the sale. But the evidence, we think, shows that the plaintiff, at the time he accepted the money, had knowledge of the essential facts pertaining to the mode in which the horse was sold. As to the plaintiff's position, that he accepted the money merely for the purpose of paying it to Haynes, we have to say that we do not think that he is sustained by the evidence. We think that he accepted it as his own. In the very act, indeed, in which he accepted it, he used a part in paying Webster. We have no doubt that at that time he intended to treat the sale as valid, and rely upon his offer made to Haynes to enable him to reacquire the horse by contract. We have looked in vain for any evidence tending to show that he made the offer which he did upon the theory that the horse was still his, and that his offer was made as a condition precedent to his right to test the validity of the sale. We think that he assumed that it was valid, and intended to appropriate the proceeds, and negotiate as best he could with Haynes for a relinquishment of his claim.

The judgment of the circuit court must be

AFFIRMED.

THE STATE V. HART.

1. **Criminal Law: DISCHARGE OF GRAND JURY AS ILLEGALLY DRAWN:** INDICTMENT BY SECOND GRAND JURY: MOTION TO QUASH BECAUSE FIRST JURY WAS ILLEGALLY DISCHARGED. A defendant held to answer to a criminal charge had challenged the grand jury on the ground that it was illegally drawn, and the challenge was sustained and the jury discharged, and another jury was summoned and impaneled as prescribed by Code, § 244. The defendant in this case was indicted by the second grand jury, and he moved to quash the indictment on the ground that the first jury was illegally discharged and, consequently, that the second one was illegally drawn. *Held* that the order discharging the first jury could not thus be collaterally attacked.
2. —: **EVIDENCE OF MORAL CHARACTER OF WITNESS: WHO COMPETENT TO TESTIFY TO.** A witness who showed that he had known defendant for many years—ever since he was a small boy—was competent to testify to his moral character as a test of his credibility as a witness. Code, § 3649.
3. —: —: **LIMIT AS TO TIME: INSTRUCTION: ERROR WITHOUT PREJUDICE.** If an instruction directing the jury that the character and reputation of a witness in the community where he resides, *or has resided*, may be considered for the purpose of testing his credibility is erroneous, in that it does not limit the evidence to places where the witness has resided *recently*, yet, since all the witnesses testifying to defendant's bad moral character in this case testified that they had known him for a great many years, and up to the time of the trial, and lived in the county of his residence, *held* that the error in the instruction, if any, was without prejudice to defendant, and no ground for reversal.
4. —: **FORGERY: INDICTMENT: NAME OF PERSON DEFRAUDED.** An indictment for forgery need not allege the name of the person to whom the forged instrument was uttered. Code, § 4313. *State v. Stuart*, 61 Iowa, 203, followed.

Appeal from Cass District Court.

TUESDAY, OCTOBER 20.

DEFENDANT was indicted and convicted of the crime of forgery. He now appeals to this court.

E. Willard and *L. L. De Lano*, for appellant.

A. J. Baker, Attorney-general, for the State.

BECK, CH. J.—I. The defendant moved to set aside the indictment for the reason that the grand jury finding it had not been drawn in the manner prescribed by law. The facts upon which the motion was based are these: A defendant held to answer to a criminal charge had challenged the grand jury on the ground that it was illegally drawn, in that the lists of grand jurors had been compared with a transcript of the poll-books, and not with the poll-books themselves. See Code, § 240. Upon the consideration of the challenge, the district court sustained it, deciding that the jury had not been lawfully drawn, and discharged the grand jury, and another was summoned as prescribed by Code, § 244. Defendant was indicted by the grand jury summoned in the place of the one discharged. He now insists that the first grand jury was illegally discharged, and that the second was therefore unlawfully impaneled.

II. The question of the illegal impaneling of the second jury depends upon the correctness of the decision of the court in discharging the first. If that decision was correct, then the second was lawfully impaneled. It will be held by the law as correct until it is lawfully set aside or reversed. But that cannot be done in a collateral proceeding, and the motion of defendant to quash the indictment is of such a proceeding. We must keep in view the exact facts. Defendant by his motion does not directly assail the decision under which the first jury was discharged; he attacks the order of the court impaneling the second, which he claims was irregular because there was another lawful jury, the first one, or because the decision under which it was discharged was erroneous. He thus, in fact, assails the first order in a collateral proceeding. We need not inquire whether defendant could, under the provisions of the law, assail in any manner the order for the discharge of the first jury. If the statute makes no provision for such a proceeding, we cannot supply the omission. The impediment in the way of the

administration of the criminal law, which would arise in case defendant's position is sound, would obviously result, in many cases, in the defeat of justice. The order of the court discharging the grand jury would come up for review in all cases wherein indictments should be found by the second grand jury, thus making the administration of justice uncertain. The objection urged by defendant is not commended to us by any showing, or even allegations, of prejudice or possible injustice resulting to defendant by reason of the fact that the indictment was found by the second grand jury. And we cannot imagine any special prejudice that would result to him therefrom, or that the fact in any manner would work injustice. The courts, we think, are beginning to turn their faces from all technical objections made in criminal cases, and from all complaints of irregularities and non-compliance with forms from which no prejudice or injustice could result to the accused. It is well that this disposition now exists, and it is to the discredit of the administration of the law that it has not been exhibited in years gone by.

III. A witness who has known defendant well, and has resided in the town where he was raised, testified, in response to a proper question, that his general moral character was bad. This evidence was objected to on the ground that it was "incompetent, immaterial, and not rebutting;" and that the impeaching witness must show—which was not done in this case—that he knew the reputation of the witness in the neighborhood where he resided. The Code, § 3649, provides that "the general moral character of the witness may be proved for the purpose of testing his credibility." The evidence in question is competent and material under this provision.

IV. If the word "character" used in the section quoted means reputation, we are authorized to believe that the witness used the word in that sense. Indeed, it is commonly so used in conversation. The witness shows that he had known defendant well for many years,—ever since he was a small

2. — : evidence of moral character of witness: who competent to testify to.

The State v. Hart.

boy; inferentially showing that he was acquainted with defendant's "character" or "reputation" among his neighbors.

V. An instruction of the court directed the jury that the character and reputation of a witness in the community

3. —: —: "where he resides, or has resided," may be considered "for the purpose of affecting his credibility." This instruction is objected to on the ground that it permits evidence of reputation in

all communities where the witness has resided. Evidently, if the evidence is confined to a recent period, it is competent, and the instruction, probably, ought to have been so limited. If the instruction is erroneous in this respect, the witnesses impeaching defendant all show that they knew defendant well for a great many years, and up to the time of trial, and lived in the county of his residence. No prejudice, therefore, could have resulted to defendant from the error in the instruction, if there be error in this regard.

VI. It is next insisted that, as the indictment does not show to whom the forged paper was uttered, the conviction

4. —: —: cannot be supported. But the objection was not made except upon a motion in arrest, and no question was made as to the party to whom the paper was uttered. He was the party defrauded

by the forgery, and it was not necessary to set out his name in the indictment. Code, § 4313. See *State v. Maxwell*, 47 Iowa, 454. This court has held that an indictment for forgery which fails to allege the name of the person to whom the forged instrument was uttered is good. *State v. Stuart*, 61 Iowa, 203.

VII. We are of the opinion that the evidence sufficiently supports the conviction.

The foregoing discussion disposes of all questions in the case.

AFFIRMED.

BARKER V. THE TOWN OF PERRY.

1. **Evidence: PERSONAL INJURY: EXHIBITION OF WOUNDS TO JURY.**

The practice of permitting persons who sue for personal injuries to exhibit to the jury their wounds or injured limbs has been too long sanctioned in this state to be now called in question.

2. ———: **PHOTOGRAPHIC VIEWS: MAGNIFYING GLASSES: TAKING VIEWS TO JURY ROOM.** Wherever it is proper that the *locus in quo*, or any object, be described to the jury, it is competent to introduce a photographic view of the same, and to allow the jury to examine it with a magnifying glass. And there is no impropriety in allowing the jury to take such photograph with them to their room. See cases cited in opinion.

3. ———: **CONDITION OF SIDEWALK AFTER ACCIDENT THEREON.** In an action for an injury on a defective sidewalk, it was competent to show that, subsequent to the accident, when a photographic view of the walk, introduced in evidence, was taken, the walk was in the same condition as when the accident occurred.

4. **Cities and Towns: INJURY ON SIDEWALK: HOW LONG OUT OF REPAIR: INSTRUCTION.** In an action to recover for an injury on a sidewalk, it was proper to direct the jury that they should determine from all the evidence, including a photograph of the walk, the length of time the defect had existed.

Appeal from Dallas Circuit Court.

TUESDAY, OCTOBER 20.

THIS is an action to recover damages for a personal injury which the plaintiff alleges she received by reason of a defective sidewalk on one of the streets of the town of Perry. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Cardell & Shortley, for appellant.

H. A. Hoyt and *T. R. North*, for appellee.

ROTEBOCK, J.—I. It is claimed in the petition that the plaintiff was injured by stepping into an opening in a side-

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97	711
67	146
126	286
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67	146
134	520

Barker v. The Town of Perry.

1. EVIDENCE:
personal in-
jury: exhibi-
tion of
wounds to
jury.

walk. There are the usual allegations as to the defect, and notice to the officers of the town, and failure to repair, and that plaintiff was free from negligence. The answer was in substance a general denial. The plaintiff claimed that she was injured in her hand and wrist, and she was permitted, against the defendant's objection, to exhibit her hand and wrist to the jury for their inspection. It is claimed that this was error. In all actions for injuries to the person, injuries upon the person may be shown to the jury and inspected by them. So, in the trial of criminal assaults, we think it is the universal practice to exhibit the wounds upon the person to the jury. This kind of evidence is of an important and satisfactory nature. It brings before the jury part of the *res gestæ*, and enables them to determine the nature and character of the injury better than to receive it in a secondary way, as it must be when described by witnesses. The practice of permitting persons who sue for personal injuries to exhibit to the jury their wounds or injured limbs has been too long sanctioned in this state to be now called in question. *Mulhado v. Railroad Co.*, 30 N. Y., 370.

II. A few days after the plaintiff received the injury a photographic view was taken of the defective walk. The evidence showed that the walk was in the same condition when the view was taken as it was when plaintiff was injured. The photograph was introduced in evidence by the plaintiff against the objection of the defendant. In connection with it the plaintiff handed a magnifying glass to the jury, to enable them to make a minute examination of the photograph, and the jury were permitted to take the photograph and magnifying glass with them to the jury-room when they retired to deliberate upon the case. The defendant excepted to this action of the court, and assigns error thereon. Photographic views of streets, buildings, railroad tracks, bridges, and many other objects, are frequently found in the abstracts of cases submitted to this court, having been used as evidence in the trial courts. They

2. —: pho-
tographic
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nifying
glasses: tak-
ing views to
jury room.

are used to identify the objects to which the evidence relates, and, being an exact reproduction of the object they represent, they are much more satisfactory evidence of the appearance of the thing represented than can be conveyed to the mind by any description given by a witness. We think, wherever it is important that the *locus in quo*, or any object, be described to a jury, it is competent to introduce a photographic view. It appears to have met the approval of courts in a number of cases. *Locke v. Sioux City & P. R. Co.*, 46 Iowa, 109; *Reddin v. Gates*, 52 Id., 210; *German Theological School v. City of Dubuque*, 64 Id., 736; *Udderzook's Case*, 76 Pa. St., 340; *Ruloff v. People*, 45 N. Y., 213; *Marcy v. Barnes*, 16 Gray, 161.

Supplying the jury with a magnifying glass, with the permission of the court, was no just cause of complaint. Many jurors are required, by age or defect of sight, to use glasses to enable them to read the evidence submitted to them, or to read the instructions of the court. If one of such jurors should lose his spectacles, it would be rather a rigid sort of practice which would preclude the court from allowing glasses to be handed to him to enable him to examine such writings as his duty requires him to examine. We cannot see that allowing the jurors to use the magnifying glass was any departure from proper practice in the trial of causes.

In regard to allowing the jury to take the photograph to the jury-room, it is sufficient to say that the statute (Code, § 2797) prohibits the jury from taking depositions with them, but does not exclude any other evidence which is in any proper form to be taken and considered by them.

III. The defendant objected to the testimony of certain witnesses as to the condition of the sidewalk after the accident.

This testimony was introduced for the purpose of showing that the sidewalk was in the same condition when it was photographed as it was when the plaintiff was injured. We think the evidence was proper. It was necessary for the plaintiff to show that the condition

3. —; condition of sidewalk after accident thereon.

Mathews v. Winchell et al.

of the walk remained the same, to enable her to introduce the photograph in evidence.

IV. Objection is made to an instruction given by the court to the jury because it directs them that they have the right to determine from all the evidence, including the photograph, the length of time the defect existed. We do not think the instruction is vulnerable to this objection. The judge very plainly directed them that they had no right to speculate or guess as to the length of time this defect existed, from the appearance of the photograph itself.

4. CITIES and
TOWNS: injury
on sidewalk:
how long out
of repair: in-
struction.

AFFIRMED.

MATHEWS V. WINCHELL ET AL.

1. **Railroads: TAX IN AID OF: FORFEITURE BY ALIENATION OF ROAD: INJUNCTION.** *Manning v. Mathews*, 66 Iowa, 675, followed.

Appeal from Jasper Circuit Court.

TUESDAY, OCTOBER 20.

THIS is an equitable action involving the validity of a tax voted to aid in the construction of a railroad. There was a decree for the plaintiff, and the defendant appeals.

R. A. Sankey, C. H. Gatch and Smith McPherson, for appellants.

H. S. Winslow, for appellee.

ROTHROCK, J.—This cause presents substantially the same questions which were determined by this court in the case of *Manning v. Mathews*, 66 Iowa, 675. Following the decision there made, the decree of the circuit court will be

AFFIRMED.

WHITSETT V. THE CHICAGO, ROCK ISLAND & PACIFIC R'y Co.

1. **Railroads: PERSONAL INJURY TO BRAKEMAN: CONTRIBUTORY NEGLIGENCE: EVIDENCE OF CUSTOM.** In an action by a brakeman for a personal injury caused by the negligence of defendant's engineer, it was competent for plaintiff, in order to show that he was not guilty of contributory negligence, to prove that, in performing the duty in which he was engaged when he received the injury, he adopted the course usually pursued under the same circumstances by men in that calling, though in the employment of other companies. *Jeffrey v. Keokuk & D. M. R'y Co.*, 56 Iowa, 546, followed.
2. ———: ———: ———: **OPINION OF WITNESS.** In such case it is not competent for a witness, though himself a brakeman, to state that if he had been in plaintiff's place he would have done as plaintiff did.
3. ———: ———: **OPINION OF BRAKEMAN AS TO EFFECT OF TURNING ON STEAM.** One shown to have experience as a brakeman is competent to testify as to the effects produced upon a train of cars by the sudden turning on of steam after the speed of the train has been checked by the brakes.
4. **Evidence: IMPROPER CROSS-EXAMINATION.** Questions asked upon cross-examination, not for the purpose of testing the truth of any of the witness' statements in chief, or with a view of eliciting further information upon subjects on which he was examined in chief, are improper, and should be excluded when objection is made thereto.
5. **Instructions: MUST BE CONFINED TO PLEADINGS AND EVIDENCE.** It is error to submit a material question of fact to the jury upon which there is no evidence; and it is equally erroneous to submit a question which is not presented by the pleadings. For an illustration of the violation of these rules, and for authorities cited, see opinion.
6. **Railroads: INJURY TO BRAKEMAN: PRESUMPTION OF CARE FROM NATURAL INSTINCTS: WHEN IT DOES NOT OBTAIN.** The instinct of self-preservation may, in the absence of direct evidence, be allowed some weight as raising an inference of care on the part of one incurring danger; but when the facts of the transaction are proved by direct testimony, the fact of care, or the want of it, is to be determined from those facts, and there is no room for mere presumption. *Way v. Illinois Cent. R'y Co.*, 40 Iowa, 345, distinguished. *Dunlavy v. Chicago, R. I. & P. R'y Co.*, 66 Iowa, 435, followed.
7. ———: ———: **CONTRIBUTORY NEGLIGENCE: QUESTION OF LAW OR FACT: RULE STATED.** Where the facts bearing on the question of contributory negligence are such that but one conclusion can reasonably be drawn from them, it is the province of the court to determine that conclu-

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79 6067 150
80 46367 150
81 12067 150
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88 9467 150
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107 48967 150
108 60167 150
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111 52567 150
113 12967 150
114 32867 150
117 40867 150
118 40067 150
119 84567 150
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121 71167 150
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Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

sion. But if from the facts different minds might reasonably reach different conclusions, the parties are entitled to have the question submitted to a jury; and in this case *held* that the question was properly so submitted. See opinion for facts and authorities.

8. **Practice: MISCONDUCT OF COUNSEL IN ADDRESSING JURY: WAIVER OF BY FAILING TO OBJECT AT THE TIME: EXCEPTION.** While many irregularities may occur during the trial of a cause, which, unless objected to at the time, should be deemed to be waived, yet, where counsel, in addressing the jury, violates one of the plainest rules of practice to the prejudice of the other party, as was done in this case, (see opinion for facts,) the offending counsel should hardly be heard in this court to say that the misconduct was waived by the failure of opposing counsel to object at the time.

Appeal from Mahaska District Court.

TUESDAY, OCTOBER 20.

ACTION for the recovery of damages for a personal injury sustained by plaintiff while in defendant's employ as a brakeman on one of its trains, in consequence, as is alleged, of the negligence of the engineer in charge of the engine which was hauling said train. There was a verdict and judgment for plaintiff. Defendant appeals.

M. A. Low, for appellant.

Bolton & McCoy, for appellee.

REED, J.—Plaintiff was employed as head brakeman on a freight train. He had been in defendant's service about ten days at the time he received the injuries complained of, but had some experience as brakeman on another road before entering defendant's employment. At the time of the accident he was making his first trip with the engineer who was in charge of the engine. The accident happened as the train was approaching a station at which it was to be side-tracked to permit a passenger train, which was following, to pass on the main track. It is the duty of the head brakeman, when the train is approaching a station at which it is to be side-

 Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

tracked, to reduce its speed by applying the brakes, and when it has reached the proper distance from the switch to get down from it, while it is still in motion, and go forward and so adjust the switch as to permit the train to pass on to the side track. Plaintiff was in the performance of this duty at the time of the accident. He applied the brakes and reduced the speed of the train. He then started forward to the engine, in order, as he claims, to be in a convenient position from which to get down from the train when it should arrive within the proper distance of the switch. The car immediately in the rear of the tender was an ordinary box car, its top being somewhat higher than the top of the tender, and when plaintiff was in the act of getting from the car to the tender, or immediately after he stepped upon the tender, he fell to the ground and sustained the injuries of which he complains. His claim is that he was performing the duty required of him in the manner in which it is ordinarily performed, and that the engineer knew that he would descend to the tender from said box car after he had applied the brakes, and that he knew he was in the act of getting down from the car to the tender, and with that knowledge he negligently turned on steam, without giving him any warning that he was about to do so, and that the turning on of the steam caused a sudden increase in motion of the engine, and that he was thrown from the train by the jerking caused by this movement.

I. There was a tool-chest on the tender, which extended across the rear end and occupied the greater portion of it

1. RAILROADS:
personal in-
jury to brake-
man: contri-
butory negli-
gence: evi-
dence of cus-
tom.

There was a space, however, of from eight inches to one foot in width between the ends of the chest and the sides of the tender, and there was evidence tending to prove that plaintiff jumped or stepped from the top of the box car into one of these spaces. One question which arose in the case was whether there was any necessity for plaintiff to go forward to the engine before getting down from the train, and whether

Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

he might not have left it with greater safety to himself by descending a ladder at the end of the box car, and stepping from that point to the ground. Another question was whether he exercised all reasonable care for his safety in passing from the box car to the tender. He was examined as a witness in his own behalf, and, against defendant's objection, was permitted to testify that brakemen, when they were required to go ahead to open switches, usually went forward to the engine before getting down from the train, and that it was easier to get down from the engine than from other places in the train, for the reason that the step on the engine was a foot nearer the ground than were those on the box cars. Two other witnesses who had been employed as brakemen on other roads, but who had never worked on defendant's road, were permitted to testify to substantially the same facts. The objection urged against the admission of this testimony was that defendant would be bound by the custom only, in case it prevailed, in the operation of its own road, and it did not appear that the witnesses were competent to testify as to the custom on its road. The evidence was offered, however, not for the purpose of proving a custom which would be binding upon defendant, but to show that plaintiff was not guilty of negligence in adopting that particular course in performing the duty. In the absence of express rule or direction prescribing the particular course he should pursue under the circumstances, he was required to choose between the two courses. And if, in making that choice, he adopted the course usually followed under like circumstances by men in that calling, that fact would have a very important bearing upon the question whether he exercised due care in making the choice. It was, therefore, not material whether the witnesses could testify to the custom on defendant's road or not. It was sufficient if they were able to testify to the course pursued under similar circumstances by men generally in that employment. *Jeffrey v. Keokuk & D. M. R'y Co.*, 56 Iowa, 546.

 Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

One of the witnesses was permitted to testify, however, that, in going from the top of a box car in the rear of the tender to the engine, he would jump down on the same place in the tender on which plaintiff testified he jumped at the time of the accident. This

evidence is incompetent. It was for the jury to say, under all the circumstances of the transaction, whether plaintiff exercised due care in passing from the car to the tender. The statement of the witness was, in effect, an expression of opinion by him that what plaintiff did was the proper thing to do under the circumstances. This clearly was not competent. *Jeffrey v. Keokuk & D. M. R'y Co., supra.* The same witness was also permitted to testify that if the motion of the engine is suddenly increased after the speed of the

train has been checked with the brakes, it will cause a jerking of the train more or less violent, and that he had known coupling links and pins to be broken by that means. The objection urged

against the admission of this testimony was that it was irrelevant and incompetent. The witness was a brakeman, but had never been employed on defendant's road. He gave an opinion based upon facts which had come under his own observation as to the effect which the sudden increase of the motion of the engine would have under given circumstances upon the balance of the train. We think the opinions of witnesses competent to form correct opinions on the subject are admissible to prove that fact; and we think, also, that the witness was shown to be competent to give an opinion. A question in the case was whether plaintiff was thrown from the train by a sudden jerk caused by an increased motion of the engine. There was other evidence tending to prove that steam was turned on to the engine and that its motion was increased. The evidence objected to tended to prove that if that was done it would have a tendency to cause the result which plaintiff claims was produced by it. It was therefore relevant to the issue.

 Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

II. Defendant examined as a witness the engineer who was in charge of the engine at the time of the accident, and complaint is made of the action of the court in requiring him to answer certain questions asked him by plaintiff's counsel on cross-examination.

4. EVIDENCE:
Improper
cross-exam-
ination.

Without setting out the questions objected to, we deem it sufficient to say that they in no manner related to the subjects upon which the witness was examined in chief. They were not asked for the purpose of testing the truth of any of his statements in chief, or with the view of eliciting further information than had been given in his examination in chief on subjects upon which he was examined; but were calculated and intended, no doubt, to elicit evidence of an independent fact which plaintiff's counsel deemed material to his case. The objection that the questions were not allowable on cross-examination should have been sustained.

III. The court gave the following instructions to the jury, the giving of which was assigned as error: "If you find from the evidence that the injury was caused by the engineer's putting on more steam, and thereby causing a jerk of the car on which plaintiff was then standing or being, and you further so find that he put on no more steam than was usual and necessary for the proper movement of the train, and under the circumstances disclosed by the evidence, this would not constitute such negligence on the part of the engineer as would render defendant liable in this case, unless you further find from the evidence that at the time of so putting on steam the engineer knew that plaintiff was in a dangerous situation, and after having such knowledge could have avoided the injury by the exercise of ordinary care. But if you find that the engineer put on more steam than was usual or necessary at such time and place, and had good reason to believe that it would have the effect to render it more than ordinarily dangerous for brakemen on the train or cars behind by reason of an unusually violent and sudden jerking of the cars, and that he gave

5. INSTRUCTIONS: must
be confined
to pleadings
and evidence.

Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

no notice or warning to plaintiff of such jerking, or such putting on of steam, then such putting on of steam would constitute a want of ordinary care on the part of the engineer."

The jury were told in effect, by these instructions, that plaintiff would be entitled to recover if he had established either (1) that the engineer turned on no more steam than was usual and necessary for the proper movement of the train at the time, but that he knew at the time that plaintiff was in a position of danger, and could have avoided the injury by the exercise of ordinary care, but neglected to use such care; or (2) that he turned on more steam than was usual or necessary at the time, and knew that this would have the effect to render it more than ordinarily dangerous to brakemen on the train, but gave plaintiff no warning or notice of his intention to put on the steam. We think the court was not warranted by the evidence in submitting either of these instructions to the jury. Steam was turned on by the engineer, but the evidence shows, without any conflict, that this was rendered necessary by the fact that the train was on a slight up-grade, and its momentum was not sufficient to carry it to the switch; and we find no evidence in the record that more steam was turned on than was usual or necessary for the proper movement of the train at the time. The evidence shows that the turning on of the steam caused a sudden jerking of the train; but it is shown that this always occurs when the motion of the engine is increased, and the slack in the train is taken up. Plaintiff testified that the jerk occurred at the instant he stepped or jumped into the space between the tool-chest and the side of the tender. There is no claim that it was sufficiently violent to have thrown him from the train if it had occurred while he was on the box car, or that he would have been injured by it if he had succeeded in reaching the middle portion of the tender before it occurred. But the danger of the situation arose from the fact that the jerk occurred at the instant his feet alighted in the narrow space between the tool-chest and the side of the

Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

tender. And there is no evidence that the engineer knew when he turned on the steam that plaintiff was in that position, or that he was about to place himself in that position. The engineer testified that his whole attention was taken up at the time with the engine, and that he was looking in the opposite direction from where plaintiff was; and he is corroborated by the fireman, and is not contradicted by any other witness.

We think, also, that the second instruction quoted submits to the jury a question which does not arise under the pleadings. The act of negligence charged in the petition is that the engineer turned on the steam without giving the plaintiff any warning, when he knew that he was about to come down from the top of the box car over the tender and into the cab, and when he knew, also, that the turning on of the steam would cause the engine to make a sudden jerk forward, and would be liable to throw plaintiff from the train. The allegation is, not that "he turned on more steam than was usual or necessary at such time and place," but that he was negligent in turning it on at the time he did, when he knew that plaintiff was in a position where he was liable to be injured by the jerking of the train which would be occasioned by it. This court has often held that it is error to submit a material question of fact to the jury upon which there is no evidence. *State v. Osborn*, 45 Iowa, 425; *York v. Wallace*, 48 Iowa, 305; *Templin v. Rothweiler*, 56 Iowa, 259. It is equally erroneous to submit a question which is not presented by the pleadings.

IV. The jury were told in another instruction that they should consider and give proper weight to the instincts and presumptions which naturally lead men to avoid injury to themselves and preserve their own lives, in determining whether plaintiff at the time of the accident was in the exercise of ordinary care. In *Way v. Illinois Cent. R'y Co.*, 40 Iowa, 341, the jury were instructed that, in determining what the deceased was

6. RAILROADS:
injury to
brakeman:
presumption
of care from
natural in-
stincts: when
it does not
obtain.

 Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

doing at the instant he received the injury which caused his death, they might give due weight to the instincts which naturally lead men to avoid injury and preserve their lives, and the instruction was approved by this court. In that case death had resulted from the injury, and it was material to determine just what the deceased was doing at the instant the injury occurred. There was no direct testimony from which that fact could be determined, and the holding is that the instinct of self preservation might be considered in connection with the circumstances proven in determining it. But when the facts of the transaction are proven by direct testimony, the question whether the party acted negligently or with care is to be determined from those facts. Plaintiff testified that he, in the night time, and when the train was in motion, jumped or stepped from the top of the box car into a narrow space between the end of the tool-chest and the side of the tender, and the question was whether this was a negligent or careful act. It is manifest that the consideration that men do not ordinarily expose themselves to dangers or death can have no weight in determining that question. The same instruction upon a similar state of facts was disapproved in *Dunlavy v. Chicago, R. I. & P. R. Co.*, 66 Iowa, 435.

V. It was shown that there was a hand-hold and ladder on the end of the box car towards the tender, and that by descending this ladder plaintiff might have reached a position from which he could have jumped or stepped to the ground without going upon the tender or engine. Defendant asked the court to instruct the jury that if this ladder was intended for the descent of plaintiff from the car, and he neglected to use it in going from the car, but instead of using it jumped from the car to the tender, he could not recover.

Other instructions were asked, to the effect that if plaintiff, by jumping from the car to the tender, exposed himself to greater danger than he would have done if he had passed

7. —; —: contributory negligence: question of law or fact: rule stated.

Whitsett v. The Chicago, Rock Island & Pacific R'y Co.

from the car by the ladder, he was guilty of such contributory negligence as would defeat a recovery. The court refused to give these instructions, and such refusal was assigned as error.

We think the action of the court is right. The question whether plaintiff was guilty of contributory negligence was one of fact for the jury. It is true that there was but little dispute as to the facts. But the question whether a party has been guilty of negligence is not always one of law, when the facts are undisputed. If the facts are such that but one conclusion can reasonably be drawn from them, it is the province of the court to determine that conclusion. But if different minds might reasonably reach different conclusions from them, the parties are entitled to have the question determined by the jury. *Milne v. Walker*, 59 Iowa, 186. We think the court properly submitted the question to the jury. See, also, *Hatfield v. Chicago, R. I. & P. R'y Co.*, 61 Iowa, 434; *Houser v. Same*, 60 Id., 230; *Slossen v. Burlington C. R. & N. R'y Co.*, Id., 215; *Sloan v. Central Iowa R'y Co.*, 62 Id., 728.

VI. One of the grounds of the motion for a new trial was that plaintiff's counsel were guilty of misconduct in making certain statements in their arguments to the jury which were not warranted by any evidence in the case. The counsel who made the opening argument made the following statement to the jury: "It is easy for them to get their witnesses. They will bring a fellow across the continent if it is necessary; and he comes if he loses his job. They do not always bring all of their employes. There was another employe in this case; he was hind brakeman, and he knew something of the matter, and he opened his mouth and it was unfavorable to them, and they turned him off, and he is in Missouri or somewhere else, you do not know where. Why did they not bring him? Because he is a sardine, and they do not want him. They know those who will testify for

8. PRACTICE:
misconduct of
counsel in ad-
dressing jury:
waiver of by
failing to ob-
ject at the
time: excep-
tion.

them, and those who will not they discharge from the road." There was no basis in the evidence for any of these statements with reference to the rear brakeman. They are statements of fact which were introduced into the case for the first time during the argument to the jury.

Without attempting to justify this practice, counsel for plaintiff insist that, as defendant made no objection at the time, and did not ask the district court to exclude the objectionable statement from the attention of the jury, it cannot now be heard to complain. It is doubtless true that many irregularities may occur during the trial of a cause, which, unless objected to at the time, should be deemed to be waived. A party could hardly sit by in silence and hear erroneous or extravagant claims made with reference to the evidence, without waiving the right to complain of such statements in the future. But, in this case, the statement was that certain facts existed of which there was not only no evidence, but no claim that they were proven; and from that statement the jury were asked to make certain deductions prejudicial to the other party to the cause. After thus violating one of the plainest rules of practice to the prejudice of the other party, we are not prepared to say that counsel should now be heard to claim that their misconduct was waived by the failure of defendant to object to it at the time. But, as the cause must be reversed on other grounds, we do not deem it necessary to determine the matter.

Objection is made to certain statements made in the closing argument. Without setting them out, we deem it sufficient to say that they afford defendant no just ground of complaint.

Other questions have been argued by counsel, but, as they will probably not arise on a retrial of the cause, we do not consider them. For the errors pointed out, the judgment is

REVERSED.

Drennan et al. v. Graham et al.—Smith v. McKee.

DRENNAN ET AL. V. GRAHAM ET AL.

- 1. Railroads: TAX IN AID OF: FORFEITURE BY ALIENATION OF ROAD: INJUNCTION.** *Manning v. Mathews*, 66 Iowa, 675, followed.

Appeal from Mahaska Circuit Court.

TUESDAY, OCTOBER 20.

ACTION in equity to enjoin the collection of a tax voted in aid of the construction of the New Sharon, Coal Valley & Eastern Railroad. Decree for the plaintiffs, and the defendants appeal.

G. W. Lafferty and *R. A. Sankey*, for appellants.

L. C. Blanchard and *Geo. C. Morgan*, for appellees.

SREVEES, J.—The facts in this case are the same as in *Manning v. Mathews*, 66 Iowa, 675, and therefore this case must be

AFFIRMED.

SMITH V. MCKEE.

- 1. Guardian and Ward: SETTLEMENT: WORTHLESS NOTE TAKEN BY WARD: WHOSE LOSS.** Defendant's wife was plaintiff's guardian, and defendant was the surety on her bond, but she died shortly before the time when she had given notice that she would make her final settlement, and defendant took charge of the ward's estate and made the settlement, in which plaintiff accepted a note taken by the guardian for money loaned by her as such. The note was good when made, but proved to be worthless when so taken, but no representations were made by the defendant as to the solvency of the makers. Defendant's attorney, however, stated in the presence of both parties that he believed one of the makers to be good, whereupon the note was accepted. It does not appear that either the defendant or his attorney knew that the

Smith v. McKee.

makers were insolvent. *Held* that, as there was no fraud practiced, and as defendant did not hold a fiduciary relation to plaintiff, he was not liable to her for the amount of the note.

Appeal from Jefferson Circuit Court.

WEDNESDAY, OCTOBER 21.

ACTION to recover the amount of a promissory note received by the plaintiff under the circumstances stated in the opinion. Judgment for the defendant, and the plaintiff appeals.

Leggett & McKemey, for appellant.

J. R. McCrackin, appellee.

SEEVERS, J.—The defendant was the husband of the plaintiff's mother, who was the plaintiff's guardian, and the defendant was surety on the guardian's bond. Mrs. McKee died in 1878, and prior to her death she gave notice of her intention to make a final settlement as such guardian, but died before doing so. After the death of his wife, the defendant took charge of the ward's estate and made the final report, and there was a settlement of the accounts and an adjustment of the amount due the plaintiff, who at that time was married, and, by agreement between her and her husband and the defendant, she accepted a promissory note in part payment of the amount due her from the guardian. Said note was executed for money borrowed by the makers of the guardian. When the money was loaned and the note given the makers were solvent, but they had become insolvent at the time of the settlement, and neither the plaintiff nor defendant was aware of this fact. The attorney who assisted the defendant in making the settlement stated in the presence of the plaintiff and defendant, at the time the note was paid over to the former, that he believed "I. S. Sutter, one of the makers of said note, and surety thereon, to be

Smith v. McKee.

good, but that the other maker was not good." Thereupon, the plaintiff relying on such statement and believing the note to be good and the makers to be solvent, * * * the note was by her accepted." The attorney had no knowledge of the insolvency of the maker of the note that he represented to be good. The foregoing are substantially the facts found by the court.

The defendant was not the guardian of the plaintiff, nor did he sustain any fiduciary relation to her. He made no representations, and, conceding that he is bound by what the attorney said, there was no fraud perpetrated. The attorney believed what he said to be true. The note was found among the assets of the estate in the hands of the guardian, and it represented the ward's money loaned to the makers of the note by the guardian. The makers were solvent when the note was made, and there is nothing in the finding of facts which tends to show negligence in any respect on the part of the guardian or on the part of the defendant. It is doubtful, to say the least, whether under the circumstances the loss should not be borne by the plaintiff. But the plaintiff, in reliance on the statement, and believing the note to be good, accepted it. She therefore did not rely wholly on what the attorney said, but acted in part on her own belief as to the solvency of the makers of the note. As there was no fraud in the transaction, or any fiduciary relation existing between the plaintiff and the defendant, we think the plaintiff is remediless. The law cannot in all cases protect the careless and negligent. The plaintiff should have made inquiry. There is nothing to show that the defendant or his attorney had any better or other means of knowledge than the plaintiff had.

AFFIRMED.

MILLS & Co. v. COLLINS ET AL.

1. **Fraud:** AS DEFENSE TO CONTRACT: HOW PLEADED. While fraud is a good defense to a contract, it is not sufficient to plead it in general terms. The specific statements and acts relied upon as constituting the fraud must be set out, and, if these do not show fraud, the pleading is insufficient, and may be assailed by demurrer.
2. **Contract:** FOR PURCHASE OF SCHOOL FURNITURE: FRAUDULENT IMPOSITION UPON MEMBERS OF SCHOOL BOARD: INDIVIDUAL LIABILITY. Where certain members of the board of school directors of a district township were induced by plaintiffs to sign a contract to pay for certain school furniture to be bought of plaintiffs, upon the false representation that the president of the board had agreed to and would sign it,—the validity of the contract being conditioned by its terms upon its being signed by a majority of the board,—*held* that it was void, on account of fraud, as to those who signed it upon the false representation above stated; and that, since without their signatures it was not signed by a majority of the board, it was not binding upon the others who signed it without being misled by such misrepresentations.
3. **School Directors:** FORESTALLING DELIBERATE ACTION BY PERSONAL OBLIGATIONS: PUBLIC POLICY: FRAUD. Contracts artfully drawn for the purpose of capturing the members of school boards separately, by involving them in a personal obligation, and thus forestalling their deliberate and untrammelled action as a board, are not in accord with public policy, and are not to be favored in law; and, when fraud is added in obtaining the signatures of members, such a contract cannot be upheld. For example see opinion.

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 21.

ACTION upon a contract of purchase. The defendants pleaded that their signatures to the contract were procured by fraud, setting out in what the fraud consisted. The plaintiffs demurred to the answer, and the court overruled the demurrer. The plaintiffs electing to stand upon their demurrer, judgment was rendered against them for costs. They appeal.

Cole, McVey & Clark, for appellants.

T. F. Stevenson, for appellees.

ADAMS, J.—The contract sued on is in these words :

“In consideration of the following goods, viz., eleven large state maps and eleven geographies, bought by us of Mills & Co., we agree to pay them at Des Moines, Iowa, one hundred and ten dollars on or before the first day of May, 1884, provided a majority of the following-named persons, John Ryan, T. J. Cowman, Andrew Collins, J. G. Cowman, John Hayes, Wm. Danley, Thos. Kane, John Owens, J. E. Fleck, Ed. Churchill, John Worley, shall sign this agreement. Nevertheless, the issuance and delivery to Mills & Co. on or before the first day of May, 1884, a valid school order of the district township of Des Moines, Jasper county, Iowa, for said amount, payable as above, shall be received by them in full payment thereof.

[Signed]

“ANDREW COLLINS.

“J. E. FLECK.

“J. G. COWMAN.

“T. J. COWMAN.

“JOHN OWENS.

“WM. DANLEY.

“ED. CHURCHILL.”

The defendants, for answer, averred “that they were, at the time the contract set out in said petition is claimed to have been executed, and now are, members of the school board in and for Des Moines township, Jasper county, Iowa, and John Ryan was and now is president of said board; that the signatures of Andrew Collins and T. J. Cowman to said contract were obtained on the condition and representation by plaintiffs that said John Ryan, president of said board, had agreed to and would sign said contract; and, relying, on said condition and representation, they, the last named defendants, signed said contract; that the signatures of John Owens, J. G. Cowman and J. E. Fleck to said contract were obtained

on the condition and representation by plaintiffs that the said president had agreed to call, and desired to call, a meeting of said board for the purpose of determining whether or not they would, as a board, purchase said maps and geographies, and that said president desired the last-named defendants to sign said contract as indicating a desire to have said meeting called and willingness to be present at the same; and, relying upon said representations, the said defendants last named signed said contract for said purpose, and no other; that the said signatures of Win. Danley and Ed. Churchill to said contract were obtained on the condition and representation that the other defendants had signed said contract unconditionally and absolutely, and that a majority of the said board had agreed to said contract; that none of said conditions have happened, and all of said representations were false and fraudulent, and were the inducements to the defendants to sign said contract."

The plaintiffs demurred to the answer, "(1) because the facts pleaded therein as a defense constitute no legal defense to the action; (2) because the suit is brought on a printed and written instrument admitted to be signed by the defendants, which is plain and specific in its terms, and the facts set forth in the answer are not such as to defeat the liability of the makers of said contract."

This is a law action, and it is somewhat doubtful whether the demurrer is sufficiently specific to properly raise any question for our consideration. But, in view of the way in which the case appears to have been submitted below, we will treat the demurrer as raising all the objections to the answer which are now raised in the plaintiffs' argument. Before proceeding to consider specifically the objections urged, we desire to say in a general way that the answer is not well drawn. The defendants seem to rely upon two distinct defenses: the breach of a parol condition of the contract, and fraud by which the defendants were induced to sign it; and yet these defenses are not pleaded in separate divisions, but

are mingled together as if the pleader thought that they were substantially the same thing. If the breach of an alleged parol condition had been separately pleaded, the plaintiffs might have successfully assailed by demurrer that division of the answer, because no evidence would have been admissible to show the parol condition, the alleged breach of which is relied upon as a defense. The plaintiffs should, we think, have moved for an order that the defendants be required to plead their defenses in separate divisions, or else should have moved to strike out what is alleged in respect to the breach of a parol condition. But they saw fit to demur to the answer as a whole, and if it contains any allegations which constitute a defense the demurrer was properly overruled.

1. FRAUD: as defense to contract: how pleaded. Fraud is a good defense to a contract, but it is not sufficient to plead fraud in general terms. The specific statements and acts relied upon as constituting the fraud must be set out. If these do not show fraud, the pleading is insufficient, and may be successfully assailed by demurrer.

2. CONTRACT: for purchase of school furniture: fraudulent imposition upon members of school board: individual liability. The plaintiffs contend that the representations set out by the defendants as fraudulent are not sufficient to sustain a plea of fraud. As to some of them we have to say that we think that perhaps this may be true, but as to others we think it is not true. It is alleged that the plaintiffs represented that the president, John Ryan, had agreed to sign the contract, and that the representation was false. This, while not properly pleaded as a condition, did, we think, show fraud. If he had in fact agreed to sign it, the defendants, it may be conceded, would not be released by reason of his failure to sign it. They would not be allowed to say that they relied upon his signing. There was not only no agreement, written or by parol, that he should sign it, but the defendants were to be bound if a majority signed it, and that, too, though the majority signing it did not include Ryan. But, while this is so, Collins and T. J. Cowman have a right to say that they

were influenced by the plaintiffs' statement that Ryan had agreed to sign it. The fact of his agreement was the important thing, probably, to them, whether carried out or not. The agreement, if made, though it should never be carried out, they might well think indicated beyond question his judgment as president of the board; and if others, amounting to a majority, actually signed, they might feel assured that a meeting would be called, and a school order would be drawn and substituted for this contract. We may assume that these goods were not purchased for the defendants' individual use, but for the use of the district, and would not have been purchased but for the expectation which the defendants had that they would be paid for by the district. Whatever representations, therefore, were made to them by the plaintiff for the purpose of creating a confidence in this respect, and having this effect, and determining their action in signing the contract, were, we think, fraudulent, if false, and made with the intention of deceiving and misleading.

In connection with these false representations, it is proper that we should consider the contract which the defendants were asked to sign. The more it is examined the more it will be seen that it is a very ingenious device. It was drawn with the purpose of capturing the members of the board separately, and forestalling their deliberate and untrammelled action as a board. The moment a member signed he was in no proper condition thereafter to act as a member of the board in the same matter. The majority became committed, by reason of their personal liability, to the purchase of the goods for the district, and without any hearing from the minority. The law contemplates that no liability of this kind should be imposed upon the district except by the members of the board duly convened at a board meeting, and sitting in consultation. The object of the contract was to thwart the law by destroying the board's deliberative character. The evil of such a practice is far greater than would

3. SCHOOL directors: forestalling deliberate action of by personal obligations: public policy: fraud.

naturally occur to the minds of most men who compose our boards of school directors. In the practice of obtaining such contracts we may assume that those members are approached who are understood to be most susceptible to the arts of a skillful canvasser. The practice, at least, affords an opportunity for approaching that class, and for avoiding the stronger and more independent members. Now, if in addition, signatures can be lawfully obtained upon the false representation that the stronger and more independent members have agreed to sign or approve the purchase, then the law is powerless to prevent a great evil. It may, perhaps, be said that Collins and T. J. Cowman had no right to allow themselves to be influenced by the false supposition in regard to Ryan's judgment and desires. But it is not for the plaintiffs to say this, who created the false supposition. Besides, if Collins and Cowman were to put themselves in a position which should forestall their deliberative action as members of the board, it was not improper that they should consider Ryan's judgment and desires.

Taking the allegations of the answer to be true, we think that Collins and Cowman were drawn by the plaintiffs into a contract which they had reason to believe that the district would assume, and that belief was grounded in part, at least, upon a false and fraudulent statement made by the plaintiffs to induce the contract.

Having reached this conclusion, it is not necessary to consider the other questions. If Collins and T. J. Cowman are not holden, the other defendants are not; for without the former the contract would not be signed by a majority, and, according to its own terms, would bind no one. We think that the demurrer was properly overruled.

AFFIRMED.

SEARLE V. RICHARDSON.

1. **Pleading and Practice: VERIFICATION OF PLEADING BY ATTORNEY: COMPETENCY.** An attorney for defendant is competent to verify statements in an answer, the truth of which he shows that he has heard the plaintiff admit; but his knowledge that certain other facts pleaded in the answer were adjudicated between the parties in a former trial does not qualify him to verify the statement of such facts.
2. **Deposition: USE OF IN OTHER CAUSE BETWEEN SAME PARTIES: WHAT NECESSARY TO SUCH USE.** Depositions which have been regularly taken in one cause may be used on the trial of another cause between the same parties or their privies; but in such case the parties have the same right to except to them, or move for their suppression, as though they had been taken in that cause; and in order that they may have an opportunity to avail themselves of this right, it is necessary that the depositions be filed in the cause, or leave to use them obtained, before the trial is begun. See Code, § 3751. *Shaul v. Brown*, 28 Iowa, 37, decided under a different statute, distinguished.
3. **Evidence: PLEADINGS AND JUDGMENT IN FORMER TRIAL: IDENTITY OF PARTIES: ORDER OF INTRODUCTION.** The order in which evidence should be introduced is a matter within the discretion of the trial court, and that discretion was not abused in this case by allowing the introduction of the pleadings and judgment in another case, without *first* establishing the identity of the parties and rights involved.

Appeal from Poweshiek Circuit Court.

WEDNESDAY, OCTOBER 21.

ACTION ON A PROMISSORY NOTE. Defendant answered that he signed said note as surety for Thomas Richardson, and that without his knowledge or consent plaintiff, for a valuable consideration paid by the principal debtor, agreed to extend, and did extend, the time of payment of said note for one year, whereby he was discharged. In an amendment to his answer, subsequently filed, he alleged that in a cause in the district court of Poweshiek county between the same parties, in which the same issue was involved, it was judicially determined that plaintiff had agreed with said Thomas Richardson, for a valuable consideration, to extend the time of

Searle v. Richardson.

payment of said note for one year. The judgment of the circuit court was for defendant. Plaintiff appeals.

Winslow & Varnum, for appellant.

Haines, Lyman & Howell, for appellee.

REED, J.—I. The petition was duly verified. There was attached to the original answer the affidavit of one of the attorneys who appeared for defendant, in which he swore that he appeared as attorney for defendant in an action brought by plaintiff on the same promissory note, in which it was judicially determined that plaintiff did, for a valuable consideration, extend the time of payment of said note to Thomas Richardson, and that on the trial of said cause plaintiff admitted that this defendant was surety on the note, and that her agreement with Thomas Richardson was made without defendant's knowledge or consent. After reciting these facts, the affidavit concluded with the following statement: "Wherefore the affiant says he has personal knowledge of the matters alleged in the foregoing answer, and of the allegations therein contained, as I verily believe." Plaintiff filed a motion to strike the answer from the files, on the ground that it was not properly verified. This motion was overruled, and this ruling is assigned as error. The petition being verified, all subsequent pleadings were required to be verified also. Code, § 2669.

It is provided by section 2673 of the Code that "if the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same." The question raised by the motion is whether it is shown by the averments of the affidavit that the attorney was competent to make it. It has been held that the competency of the affiant may be shown by a general averment that the affiant has knowledge of the statements of the plead-

1. PLEADING
and practice:
verification of
pleading by
attorney:
competency.

ing, and knows them to be true. *Yoe v. Nichols*, 51 Iowa, 330; *Rausch v. Moore*, 48 Id., 611. The affidavit in question, however, contains no such general averment. The allegation is that for the reasons stated the affiant has personal knowledge, etc. That is, he knows that certain statements in the answer are true, because plaintiff admitted their truth on the former trial; and he knows that another statement is true, because the court determined in another proceeding that it was true. Affiant was undoubtedly competent to verify those statements in the answer, the truth of which plaintiff had admitted in his presence; and if the former adjudication had been pleaded in the pleading which he undertook to verify; he probably would have been competent, by his knowledge of the fact of such adjudication, to verify that statement also. But it was the fact which he swears was adjudicated, and not the adjudication, which was pleaded. And we think his knowledge of the adjudication alone does not render him competent to verify the statement of the fact. The motion, therefore, should have been sustained.

II. On the trial defendant offered to read certain depositions which had been taken in another cause between the same parties in the district court. Plaintiff objected to the reading of these depositions, on the ground that they were not taken in this cause, but had been taken in a cause pending in another court. The objection was overruled, and the depositions were read in evidence. As we understand the record, the depositions had never been filed in this cause, and no application had been made before the trial for leave to use them on the trial, and the first notice or intimation which plaintiff had that they would be used was during the progress of the trial, when defendant offered to read them. That depositions which have been regularly taken in one cause may be used on the trial of another cause between the same parties or their privies is well settled. 3 Greenl. Ev., § 326;

2. DEPOSITION: use of in other cause between same parties: what necessary to such use.

Searle v. Richardson.

Shaul v. Brown, 28 Iowa, 37; *Atkins v. Anderson*, 63 Id., 739. But we are very clear that under our practice a party should not be permitted to use depositions on the trial of one cause which have been taken in another, without having filed them in the cause in which he proposes to use them, or obtaining leave before the commencement of the trial to so use them. It is provided by section 3751 of the Code that, when depositions are filed in any cause, the clerk shall at once notify the parties that they are so filed, and that no exceptions to depositions, other than for incompetency or irrelevency, shall be regarded, unless made by motion filed by the morning of the second day of the first term after the depositions have been filed by the clerk, provided they have been filed three days prior thereto; or, if they are afterwards received during the term, such motion must be filed by the morning of the third day after they are filed, and all motions to suppress depositions must be filed before the cause is reached for trial.

When it is proposed to use depositions in one cause which have been taken in another, the parties have the same right to except to them, or move for their suppression, as though they had been taken in that cause. But, under these provisions, it is very clear that they could have no opportunity to avail themselves of this right if the depositions are neither filed in the cause nor leave to use them obtained before the trial is entered upon. It is held in *Shaul v. Brown*, *supra*, that no notice was required to be given before the trial commenced of the purpose to use the depositions on the trial. But the statutes governing the right to except to, or move for the suppression of, depositions have been materially changed since that decision. We think the court erred in overruling the objection.

III. Defendant offered in evidence the pleadings and judgment in a cause in the district court, to which plaintiff

Searle v. Richardson.

3. EVIDENCE:
pleadings and
judgment in
former trial:
identity of
parties: order
of introduc-
tion.

objected on the ground of incompetency and immateriality, and the overruling of this objection is assigned as error. The point insisted upon in the argument of this assignment is that there was no proof that the former action was between the same parties, or that it involved the same rights which are involved in this action, and therefore the record is immaterial. If the position of counsel that the record does not show the identity of the parties and causes of action should be conceded, it would not follow that the objection to its introduction in evidence should have been sustained. It was competent evidence of an adjudication, and the fact of the identity of the parties and causes of action might be established by other evidence. That fact was not required to be proven as a preliminary to the right to introduce the record. It is simply (according to counsel's theory) a fact essential and material to the defense which is not established by the record. The question, then, is simply one of the order in which the evidence should have been introduced. But that is a matter within the discretion of the trial court, and there was clearly no abuse of discretion.

As we reverse the judgment on other grounds, we do not consider the question of the sufficiency of the evidence to sustain the judgment.

REVERSED.

The Hawkeye Ins. Co. v. Duffie, Judge, etc.

THE HAWKEYE INS. CO. V. DUFFIE, JUDGE, ETC.

1. **Practice:** CHANGING RECORD AT SAME TERM WHEN MADE: NOTICE TO INTERESTED PARTIES NECESSARY TO JURISDICTION: CERTIORARI: CODE, § 178, 3216. A demurrer to a petition was sustained in the district court, and, the plaintiffs in the cause electing to stand upon their petition, judgment was entered against them for costs. After the record of such proceedings was made, and approved and signed by the judge, and after counsel for defendant in the cause had left the court, but during the term at which the order and judgment were entered, the court permitted the plaintiffs in the action to withdraw their election to stand on their petition, and, without any application therefor having been filed, or any notice thereof to defendant in the action, entered an order setting aside said judgment, and granting the plaintiffs time to file an amendment to their petition. *Held* that the court had no jurisdiction, under § 178 of the Code, thus to change the record in the absence of, and without notice to, the defendant; and that, since the defendant in that cause had no opportunity to except, and thus lay the foundation for an appeal, *certiorari* would lie to correct the error. Code, § 3216.

REED, J., and BECK, CH. J., *dissenting*.

WEDNESDAY, OCTOBER 21.

CERTIORARI. On the twenty-sixth day of May, 1884, plaintiff filed a petition in this court, in which it is alleged that at the September term, 1863, there was pending in the district court of Kossuth county a certain cause wherein P. C. Kincaid and Henry Warder were plaintiffs, and the plaintiff herein was defendant; that the parties to said cause appeared at said term, and the defendant filed a demurrer to the petition theretofore filed by the plaintiffs therein, which the court, after hearing the argument of counsel, sustained; that thereupon the plaintiffs elected to stand on their petition, and announced their intention to so elect to the court, whereupon the court entered judgment against them for the costs which had accrued in the case; that a record of said order and judgment was duly made, and the same was approved and signed by the judge; that after said record was made and signed, and after counsel for the defendant had left the court,

67	175
79	487
67	175
82	98
67	175
86	218
67	175
98	302
67	175
113	273
67	175
115	382
67	175
117	286
67	175
1142	394

The Hawkeye Ins. Co. v. Duffie, Judge, etc.

but during the term at which the order and judgment were entered, the court permitted the plaintiffs in said action to withdraw their election to stand on their petition, and, without any motion or other written application therefor having been filed, or any notice thereof having been given to defendant, entered an order setting aside said judgment for costs, and granting the plaintiffs thirty days within which to file an amendment to their petition. And it is alleged that said court, and the judge thereof, exceeded their jurisdiction and acted illegally in setting aside said judgment and granting plaintiffs leave to amend their petition. On the filing of the petition a writ of *certiorari* was allowed by one of the judges of this court, and was issued by the clerk and served on defendant, and, in obedience to the mandate of the writ, defendant has filed a transcript, duly certified, of the entire records and proceedings had in said cause.

R. W. Barger, for plaintiff.

J. C. Raymond and Goode, Wishard & Phillips, for defendant.

SEEVERS, J.—It will be conceded, if the court had jurisdiction of the defendant at the time the order was made setting aside the judgment, that the order cannot be attacked in this proceeding, but that the defendant should have appealed, and thus corrected the error. Code, § 3216; *State v. Roney*, 37 Iowa, 30. It will also be conceded that the court had the power to expunge any record made during the term, provided it had jurisdiction of the parties at the time the change in the record was made. The statute upon this subject is in these words: "The record aforesaid is under the control of the court, and may be amended, or any entry therein expunged, at any time during the term at which it is made, or before it is signed by the judge." Code, § 178. It will be observed that the statute contemplates that the expunging order may be made during the term, or before the record is

signed by the judge. It frequently occurs that the record, or at least a portion of it, is not signed until the succeeding term. Sometimes it is impracticable for the clerk to prepare the record during the term, and therefore it is not signed by the judge during the term. Again, there are terms which contain several weeks or months, and the record is not signed until the close of the term, or at least this may occur. Then there are terms which last only a few days. In these several cases the power of the court to expunge an entry or change the record is precisely the same; therefore the statute must be so constructed as to deny the existence of the power, unless the court has jurisdiction of the defendant at the time the order is made; for it would be manifestly unjust for the court to correct a record made during the term at the succeeding term, which materially affected the interests or rights of a party, unless such party was before the court, or had notice of the proposed correction.

In the case at bar, final judgment had been rendered. Ordinarily, when this has been done, the case is at an end, except that a motion for a new trial may be filed within three days thereafter. While it may be that the court had jurisdiction of the defendant during such period for the purposes of such a motion, the defendant was not bound to anticipate that the plaintiff would withdraw his election to stand on the petition, or that the court would permit him to do so and file an amended petition, and that the court would set aside the final judgment previously entered. The case having been disposed of by the rendition of the final judgment, the court ceased to have jurisdiction over the defendant in the action, and the defendant's attorney was not bound to remain in court, but could well leave as he did. It may be that the order was one that should have been made, and that substantial justice required the court in this instance to do so. But this is not the controlling consideration. The controlling question is one of jurisdiction, and it is evident, if the court did not have jurisdiction of the defendant in the action, that the expunging

The Hawkeye Ins. Co. v. Duffie, Judge, etc.

order is absolutely void. As the order was made in the absence of defendant in the action, no exception could be taken, and therefore an appeal would have been ineffectual. It is true, the defendant, when it obtained knowledge of the order, might have moved the court at the succeeding term to set it aside. But the defendant was not bound to do this if the court did not have jurisdiction to make the order at the time it did so. Besides this, orders of a similar character might be made under like circumstances, of which a party might not obtain knowledge in time to remedy the wrong done, by motion or appeal. It is evident that the character or kind of order made cannot be a controlling consideration. In our opinion the expunging order must be set aside, and regarded as never having been made.

REVERSED.

REED, J., *dissenting*.—In my opinion the most that can be said is that the court erred in permitting the plaintiffs to withdraw their election to stand on their petition, and in setting aside the judgment against them for costs, and permitting them to file an amended petition. Under section 178 of the Code, quoted in the majority opinion, the court has the power at any time during the term at which it is made, or before it is signed by the judge, to amend the record, or expunge any entry therein. It necessarily retains jurisdiction of the cause and the parties while this power continues. If the court had been convinced during the term that its ruling on the demurrer was wrong, it had the power, under this provision, to set aside the judgment for costs and the order sustaining the demurrer, and enter an order overruling it. It is held in *Brace v. Grady*, 36 Iowa, 352, that the court has power during the term, under this provision, to change an order already made and recorded, when convinced that it was erroneously made. A party has no remedy by *certiorari* against an erroneous order or decision made while the court has jurisdiction of the cause and the

Evans v. Burns et al.

parties. I think, therefore, that this proceeding should be dismissed.

BECK, CH. J., concurs in this dissent.

EVANS V. BURNS ET AL.

1. **Evidence: PAROL TO EXPLAIN OR VARY WRITING: RULE STATED AND APPLIED.** Where parties have entered into a written contract, but the words do not express their whole contract, but are nevertheless of such character that the law, by implication, superadds something, the implication may be rebutted or controlled by parolevidence. But when nothing is left to implication there is no room for parol evidence. And so, where a judgment, which was a lien on land, was assigned in writing to a purchaser of a portion of the land, and it was necessary to the protection of such person that the judgment should be kept alive, *held* that it was incompetent to show by parol that the real understanding of the parties was that there was nothing to assign, but that the transaction was the payment and not a purchase of the judgment, and that the contract of assignment was a void act.

BECK, CH. J., not concurring.

Appeal from Chickasaw Circuit Court.

WEDNESDAY, OCTOBER 21.

THE plaintiff claims to be the owner of a judgment rendered upon a promissory note against the defendant Burns. The note at the time of its execution was secured by a mortgage upon about six acres of land. In the action in which the judgment was rendered there was no prayer for a decree of foreclosure, and this action is brought as supplemental to that to enforce the lien of the mortgage. The defendant Dayton is the owner of two notes executed by Burns and secured by the same mortgage, but falling due later than the note upon which the plaintiff's judgment was rendered. The court rendered a decree of foreclosure in favor of the plaintiff, and decreed that his lien is paramount to that of Dayton. Dayton appeals.

A. C. Boylan, for appellants.

J. R. Bane, for appellee.

ADAMS, J.—The appellant Dayton denies that the plaintiff is entitled to any lien at all. He concedes that Burns executed three notes, that they were all secured by one mortgage, and that the plaintiff's judgment was rendered upon the one first falling due; but he contends that the judgment was afterwards paid. Whether it was paid or not is the principal question to be determined. The undisputed facts are that the Bank of New Hampton became the owner of the three notes; that when the first fell due it obtained thereon the judgment in question, and afterwards assigned the judgment, and also the two notes not in judgment, to the defendant Dayton. Those two notes Dayton still owns; but the judgment he assigned to one Elizabeth Cronough, and she assigned it to the plaintiff. Dayton, however, contends that, while in form the transaction between him and Mrs. Cronough might appear as above stated, the payment to him by Mrs. Cronough was understood to work an actual discharge of the judgment, and he testified substantially to that effect.

The fact is, Mrs. Cronough bought about three acres of the land of Burns, the mortgagor, and took a deed of warranty, with a covenant against one-half of the mortgage, and only half. Under this state of things she had no way of protecting her title except by paying one-half of the mortgage, but it does not appear that she promised her grantor, Burns, that she would do so, and it was her right to abandon the land which she purchased and allow it to be sold under a foreclosure of the mortgage, if she preferred to do so. We have no doubt that she contemplated protecting her title by an eventual payment and discharge of the judgment, but that at the time of her transaction with Dayton she or her attorney saw that, if the judgment should be discharged, her land would still be liable for the balance of the mortgage debt. As the

judgment was the prior one of two liens, she naturally insisted that Dayton, instead of discharging the judgment, should assign it to her. Under the circumstances, this was the only way in which she could protect herself. Dayton certainly consented to this arrangement, and, having obtained her money under it, we do not think that he is entitled to dispute its legal effect. He never had any claim upon Mrs. Cronough in any form. In paying her money to him her act was purely voluntary. It was her right, therefore, to dictate the form of the transaction, and it was his right, if he did not choose to assent to it, to enforce his claim as the law allowed. It often happens that a person is willing to advance the amount of a judgment if he can have an assignment of it, but would advance nothing by way of payment and discharge of the judgment. If we should hold that by parol evidence a meaning can be put upon an assignment which is in contravention of its terms, there would be no safety in such transaction. The case is not different from what it would have been if Dayton had expressly stipulated in writing that Mrs. Cronough was to hold, own and control the judgment.

The appellant relies upon *Cousins v. Westcott*, 15 Iowa, 255; and *Harrison v. McKim*, 18 Id., 491. But in neither of those cases was it held admissible to show that the assignment had no operation. Force was given to the parties' contract, and no express words were contradicted. The most that can be said is that this court, in obedience to what is deemed the weight of authority, has gone so far as to hold that where parties have entered into a written contract, but the words do not express their whole contract, but are nevertheless of such character that the law, by implication, superadds something, the implication may be rebutted or controlled by parol evidence. In the case at bar there was nothing left for implication. The words used in the written assignment were a complete expression of the contract. The object of the parol evidence is to show that the real understanding of the parties

Hutchinson v. The Board of Equalization of the City of Oskaloosa.

was that there was nothing to assign, and that the making of the contract of assignment was a void act. We think that there is nothing in the cases cited which would justify the ruling for which the appellant contends. He relies in part upon what was done by Mrs. Cronough subsequently to the assignment, but we can see in it no intent to discharge the judgment, the lien of which was so manifestly necessary for her protection.

The evidence shows that Dayton paid \$42.95 as taxes on the premises. He asks that he may have a decree for the amount paid, and interest, and that the same be made the first lien upon the premises. The court held the lien to be inferior to the plaintiff's lien. In this we think that the court erred. The taxes before payment were certainly the first lien upon the premises, and we see no reason why a junior incumbrancer, in paying them for his protection, should not be entitled to such lien.

We think the decree correct except in regard to the lien for taxes.

MODIFIED AND AFFIRMED.

BECK, CH. J., not concurring.

HUTCHINSON V. THE BOARD OF EQUALIZATION OF THE CITY
OF OSKALOOSA.

1. **Taxation: DEDUCTION OF INDEBTEDNESS FROM MONEYS AND CREDITS: PROPERTY IN HANDS OF AGENT.** Whether the tax-payer is entitled to have an acknowledgment of indebtedness deducted from the amount of moneys and credits which he is required to list for assessment, depends on whether it is founded on an actual consideration. Code, § 814. If it is, and it evidences an actual indebtedness, he is entitled to have it deducted, regardless of the motive which may have induced him to incur the obligation. And so, where plaintiff, as the agent of some English capitalists, had invested certain moneys of theirs and controlled the securities, but, to avoid paying taxes thereon under § 817 of the Code, he caused the securities to be assigned to himself, and exe-

Hutchinsen v. The Board of Equalization of the City of Oskaloosa.

cuted his own obligations to the capitalists for the amount thereof, *held* that he was entitled to have the obligations thus incurred deducted from the amount of his moneys and credits, including the securities thus taken to himself, and that he was no longer liable to be taxed on such securities as agent.

Appeal from Mahaska Circuit Court.

WEDNESDAY, OCTOBER 21.

THE board of equalization of the city of Oskaloosa added \$13,000 to plaintiff's assessment on moneys and credits for the year 1884. They also assessed him \$22,000 (moneys and credits) as agent. He appealed from this action to the circuit court, and, upon a hearing, the court reversed the action of the board, and struck out both items from his assessment, and from this order defendant appeals.

James A. Rice and *L. C. Blanchard*, for appellant.

John O. Malcolm and *John F. Lacy*, for appellee.

REED, J.—On the hearing in the circuit court, plaintiff testified that he had, on the first day of January, 1884, moneys and credits to the amount of \$25,000, but that he was indebted to various parties to an amount in excess of that. He admitted, on cross-examination, that the item of \$25,000 was made up of various sums of money which he had received from friends of his living in England, and which he had originally loaned out for them, taking the securities given for such loans in their names, and that, without having returned any portion of said moneys to the owners, he had given his own obligations to them therefor, and had reloaned the money in his own name, or taken an assignment to himself of the securities originally taken for the loans, and that the indebtedness which he claimed should be deducted from the amount of his moneys and credits was evidenced by the obligation he had given for said moneys. He also admitted that, while he

Hutchinson v. The Board of Equalization of the City of Oskaloosa.

controlled and managed said moneys and credits as agent for the owners thereof, the public authorities asserted the right to tax him thereon, and that he had been held personally liable for the tax thereon, and that he had made the change in the mode of doing the business for the purpose of avoiding taxation. Defendant insists that the obligations do not evidence "a debt in good faith owing by him," and consequently plaintiff is not entitled to deduct their amount from the amount of moneys and credits which he is required to list for taxation.

Whether the tax-payer is entitled to have an acknowledgment of indebtedness deducted from the amount of the moneys and credits which he is required to list for assessment depends upon whether it is founded on an actual consideration. Code, § 814. If it is founded on such consideration and evidences an actual indebtedness, he is entitled to have it deducted regardless of the motive which may have influenced him to incur the obligation. The evidence shows that, in consideration of the turning over to him of the money then in his hands and the assignment to him of the securities for the loans yet outstanding, plaintiff gave his personal obligation to each of the parties for the amount of money he had received from him. He thereby became indebted to each for the amount of the obligation given him. It was the understanding and intention of the parties that he should become so indebted. The change which they intended to effect by the new arrangement was the termination of the agency and the creation of the relation of debtor and creditor between them. His obligations are clearly supported by a valid consideration, and the circuit court rightly struck out the item of \$13,000 from the assessment.

II. The assessment of \$22,000 against plaintiff as agent was based in part on the transaction stated above and in part on a transaction in which a mortgage given by one N. C. Town to secure a loan of \$50,000 was transferred by plaintiff to the Colonial United States Mortgage Company. As we

Hand v. Langland.

have seen, plaintiff did not at the time of the assessment control and manage the moneys and credits which he had received from the parties in England as their agent, but owned them in his own right; and it is shown by the evidence that he did not have the Town mortgage in his possession, and that he neither managed it nor had control over it after he transferred it, which was in April, 1882. He was not personally liable, then, for the taxes on it. Code, § 817.

AFFIRMED.

HAND V. LANGLAND.

1. New Trial: NEWLY DISCOVERED EVIDENCE: INSUFFICIENT SHOWING.

The affidavit of defendant's attorney that if a new trial were granted a certain witness who was present and testified at the trial would testify to certain material facts, which the defendant did not know, until after the trial, that the witness would testify to, *held* insufficient to warrant the granting of a new trial on the ground of newly discovered evidence.

2. Instructions: ASSUMPTION OF FACT WITHOUT EVIDENCE. An instruction founded upon an assumption of fact of which there is no evidence should not be given to the jury.

3. Practice in Supreme Court: ERRORS NOT ASSIGNED NOT CONSIDERED.

Appeal from Winneshiek Circuit Court.

WEDNESDAY, OCTOBER 21.

THIS is an action at law by which the plaintiff seeks to recover certain personal property which the defendant, who is sheriff, seized on execution as the property of George Hand and Margaret Hand. The plaintiff claims that she was the absolute owner of the property when it was levied upon. The defendant alleges that the plaintiff's title to the property is void as to the execution creditors, because it was transferred by George Hand and Margaret Hand to the plaintiff to hin-

Hand v. Langland.

der and defraud the creditors of George and Margaret Hand, and that plaintiff knew of such fraudulent purchase. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

L. Bullis, for appellant.

Willett & Willett and *J. B. Kaye*, for appellee.

ROTHROCK, J.—I. The defendant claims that the court should have ordered a new trial upon the ground of newly-discovered evidence. The affidavit relied upon to sustain this ground of the motion for a new trial was made by the defendant's attorney. It is stated in the affidavits that if a new trial should be granted, one Slater would testify to certain material facts. The affiant further states that the defendant did not know the witness would testify as claimed until after the trial. The witness was present at the trial, and was sworn and examined in behalf the defendant, and was so much interested in defendant's behalf that he sat by defendant's counsel at the trial as a prompter. His affidavit was not taken in support of the motion for a new trial, but defendant's attorney in his affidavit states that he *believes* the witness Slater will testify to the facts set forth if a new trial be granted. It will be observed from these statements that the affidavit was founded upon the merest hearsay. How the affiant could know that the defendant was ignorant of the newly-discovered evidence until after the trial, and how he could know that the witness would testify to any fact in addition to his testimony on the trial, is beyond our comprehension. If the motion had been supported by the affidavit of the witness, and some sufficient reason given why he did not disclose all of the facts on the trial, there might be some ground for entertaining the motion. The witness was a resident of the neighborhood, and his affidavit should have been taken in support of the motion. *Sully v. Kuehl*, 30 Iowa, 275.

1. NEW trial:
newly-discovered
evidence: insufficient
showing.

Hand v. Langland.

II. The defendant requested the court to instruct the jury as follows: "If, from the evidence, you believe that *Margaret Hand or George Hand, or both*, conveyed

2. INSTRUCTIONS: ASSUMPTION of fact without evidence.

all their tangible property, and that suits were pending or threatened at the time of such conveyance, this will warrant you in finding the same to have been fraudulently made by said Margaret Hand and George Hand; and if from the evidence you believe plaintiff had knowledge of *such fraudulent intent of said Margaret Hand or George Hand*, or had notice of such facts as would have put a man of ordinary prudence upon inquiry, and which, if made with ordinary diligence, would have led to the knowledge of the fraudulent purpose of such vendors, her title to the property will not be protected, notwithstanding she paid a sufficient consideration therefor." The court refused to give this instruction, and this ruling is assigned as error. The ruling of the court was correct. The instruction assumed that the jury might find that George Hand conveyed property to the plaintiff. There was no warrant for any such assumption. There was no evidence that George Hand conveyed anything to the plaintiff, and whatever fraudulent intent he may have had was wholly foreign to any legitimate question in the case.

III. It is insisted that the court erred in the fourth paragraph of the charge to the jury. We cannot consider this objection because it is not assigned as error.

3. PRACTICE in supreme court: errors not assigned not considered.

IV. Lastly, it is urged that the verdict is not supported by the evidence. We think the circuit court correctly held that this objection ought not to be sustained.

AFFIRMED.

Leyner v. Fuller et al.

LEYNER V. FULLER ET AL.

1. **Pleading: ANSWER: DENIAL OF KNOWLEDGE AND INFORMATION.** In an action to quiet title, the plaintiff, in anticipation of a defense of former adjudication, alleged that a pretended decree had been rendered in the district court, quieting the title in defendants as against the plaintiff. This allegation was admitted by the answer. The petition further stated that plaintiff had no notice of the pendency of the action in which said decree was rendered. To this allegation defendants answered that they had no knowledge or information as to whether plaintiff had such notice, except what was shown by the recitals of the decree itself; and upon such knowledge they alleged upon information and belief that plaintiff had such notice. *Held* that plaintiff's allegation that he had no notice was put in issue by the answer.
2. **Former Adjudication: NOTICE: EVIDENCE.** Evidence of notice of the pendency of a former action considered, and *held* that plaintiff had legal notice thereof, and that he was bound by the decree therein.

Appeal from Polk Circuit Court.

WEDNESDAY OCTOBER 21.

ACTION in equity to quiet the title to real estate. The plaintiff claims under the patent title, and the defendants under a tax title and a decree of the district court quieting the title in their grantor. Judgment for the defendants, and the plaintiff appeals.

Jo Harry Call, for appellant.

Mitchell, Dudley & Parry and *D. F. Witter*, for appellees.

SEEVERS, J.—The only question we shall consider is whether a decree of the district court quieting the title to the real

estate in controversy in the defendants' grantor is sufficient to bar this action. Counsel for the appellant contend that it is not, because it is admitted in the pleadings, as counsel claim, that the plaintiff had no notice of the action in which the decree was rendered.

1. PLEADING:
answer: de-
nial of knowl-
edge and in-
formation.

The petition states that a pretended decree was rendered by the district court quieting the title of said premises in Sarah H. Sanford, and against the plaintiff. This allegation is admitted in the answer. The petition further states that the plaintiff "never had actual notice or knowledge, or constructive notice, of the pending of the action in said district court aforesaid, or of the rendition of said pretended decree, until just prior to the commencement of this action." To this allegation the defendants responded as follows: "They have no knowledge or information as to whether said plaintiff had actual notice or knowledge, or constructive notice, of the pendency of said action in said district court as aforesaid, other than is shown by the recitals of said decree in said cause; and upon such knowledge they allege upon information and belief that said plaintiff had notice of said proceedings."

Instead of waiting until the defendants pleaded the decree as a defense to the action, the plaintiff stated in the petition that such a decree had been rendered, but that it did not constitute a bar to his recovery, because he had no notice or knowledge of the action, thus anticipating the defense. The statute provides that a denial of the allegations of a pleading is sufficient which states that the party denies having "any knowledge or information thereof sufficient to form a belief." Code, § 2655. This is, as we construe the answer, precisely what the pleader did. To our minds this is apparent on reading the pleadings. Besides this, we are unable to discover that any objection was made to the sufficiency of the pleading in the circuit court. The appellant cites and relies on *Manny v. French*, 23 Iowa, 250, and *Clafin v. Reese*, 54 Id., 544. These cases are distinguishable, because the denial pleaded was merely a denial of all information; the element of knowledge was omitted, and the statute requires both. In the case at bar all "knowledge and information" is denied, except that obtained from the recital of the decree, and on such knowledge, upon information and belief, it is alleged that the plaintiff had the requisite notice.

 Worthington v. Whitman, Ex'r.

Counsel for the appellant further contends that it appears from a preponderance of the evidence that the plaintiff had no notice or knowledge of the action in which the decree was rendered. The decree recites, "and said defendant having been duly served with notice of the pendency of this action." The only evidence contradictory of this recital is the evidence of the plaintiff, who positively denies that any notice was served on him, or that he had any knowledge of the pendency of the action or decree until long after the latter was entered, except that the appearance docket fails to show that an original notice was ever filed or served. We are not driven to the necessity of determining whether this evidence is sufficient to overcome the recital in the decree which was entered in 1878. The original papers are lost. There is evidence of a satisfactory character which supports the decree. The attorney who appeared for the plaintiff in the action testifies that a notice was served on the appellant. The recollection of this witness is corroborated by certain letters and *memoranda* made by him at the time, which, in our opinion, create a decided preponderance in favor of the defendant.

AFFIRMED.

WORTHINGTON V. WHITMAN, EX'R.

1. **Taxation: ASSESSMENT NECESSARY: ATTEMPT TO COLLECT WITHOUT ASSESSMENT.** The taxing power can be enforced only in accordance with the forms of law, and an assessment by legal authority is an indispensable step in the exercise of that power. Hence, where the board of supervisors, discovering that no assessment had been made, passed a resolution as follows: "The assessor having failed to assess the personal estate of R., the treasurer is instructed to present a bill for the taxes in said estate to the executor for the year 1884," *held* that the executor could not, under such proceedings, be compelled to pay taxes on such estate, and that an action therefor would not lie.

67	190
111	884
67	190
114	604
67	190
123	319

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 21.

ACTION to recover for an alleged tax. There was a judgment for the plaintiff for \$904.80. The defendant appeals.

St. John & Whisenand, for appellant.

Geo. F. McClelland, for appellee.

ADAMS, J.—The plaintiff is treasurer of Polk county, and as such brings this action to recover an alleged tax of the defendant, as executor of the will of Harriet L. Rollins, deceased. The facts appear from the finding of the court to be substantially as follows: Harriet L. Rollins, a resident of Polk county, died in May, 1884, seized of a considerable amount of personal property which was taxable in that county. What the value was does not appear, but it was of such value that the assessor would have been justified in assessing it as of the value of \$17,400, according to the valuation placed by him upon other like property that year. If it had been so assessed, the tax upon the property would have been \$904.80, according to the rate levied upon other property. No assessment in fact, however, was made. The board of supervisors, having discovered that no assessment was made, passed a resolution in the following words: "The assessor having failed to assess the personal estate of Mrs. H. L. Rollins, the treasurer is instructed to present a bill for the taxes on said estate to the executor for the year 1884." Whether such bill was presented for voluntary payment does not appear, but it was filed as a claim against the estate, and the allowance of it was objected to by the executor. The court made an order of allowance of the full amount claimed, and the question presented is as to the correctness of the order.

In our opinion it cannot be sustained. It is not enough that the alleged tax is the proportionate part of the burden

Phinney v. Donahue.

which the estate of the deceased might properly have been called upon to bear. The taxing power can be exercised only in accordance with the forms of law. *Joyner v. Third School District in Egremont*, 3 Cush., 567. The assessment or recorded valuation of property by the officer or officers having power to make such assessment or recorded valuation, is an indispensable step in the exercise of the taxing power. Such recorded valuation constitutes the basis of the levy, and without it there cannot properly be a levy. It is the tax-payer's right to have the amount of his tax entered upon the record provided by law for the same, that he may know in advance the amount which can be collected, and govern himself accordingly. As he cannot escape liability by tendering his just proportion of the public burden if the amount tendered is less than the tax levied in accordance with the forms of law, so, on the other hand, the government cannot demand more than the amount thus levied, though less than the tax-payer's just proportion.

REVERSED.

PHINNEY V. DONAHUE.

1. **Statute of Limitations:** WHAT IS BEGINNING OF SUIT: ORIGINAL NOTICE WITH APPEARANCE DAY LEFT BLANK. A notice of an action, with the appearance day left blank, is not an "original notice" within the meaning of § 2532 of the Code; and the delivery of such a notice by a justice of the peace to a constable for service, with the understanding that the latter should insert the appearance day at or before the time of service, held not to be the beginning of an action within the meaning of said section; and where action was not otherwise begun on the promissory note in question until more than ten years after the note was due, action thereon was barred by the statute of limitations. Compare *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa, 589.

Appeal from Webster Circuit Court.

WEDNESDAY, OCTOBER 21.

Phinney v. Donahue.

ACTION upon a promissory note. There was trial by the court and a judgment for the plaintiff. Defendant appeals.

Wright & Farrell, for appellant.

A. N. Botsford, for appellee.

ROTHROCK, J.—The amount in controversy is less than \$100, and this court acquires jurisdiction of the appeal by the following certificate of the trial judge:

“The amount in controversy in this case is less than one hundred dollars, and it is desirable that the opinion of the supreme court should be had on the following points of law: Where the plaintiff’s note on which suit was brought was executed by three persons, only one of whom was served with notice of suit, and fell due October 1, 1874, and was in terms made payable at a particular place, and suit was brought on said note before a justice of the peace in the place where the note was made payable, none of the defendants residing in the county where suit was brought, and two of them being non-residents of the state at the time suit was brought, and plaintiff, knowing that two of the defendants were non-residents of the county, but not knowing where the defendant afterwards served with notice resided, the original notice being signed by the justice, by him dated September 30, 1884, but the appearance day being by him left blank and remaining blank till after the notice came into the hands of the constable who served it, and there being no evidence that said blank was filled till more than ten years after the note became due, and said notice being handed to such constable, who was the constable of the township where suit was brought, by plaintiff on the thirtieth day of September, 1884, with the intention that it should be served at once; the appearance day named in said notice, the same having been filled in after it came into the hands of the said constable, being October 21, 1884, and the said notice being served by said

Phinney v. Donahue.

constable on October 14, 1884, on the defendant in a county other than that where suit was brought; and in the same case the same constable, previous to October 21, 1884, having returned another original notice of said suit dated October 14, 1884, with an acceptance of service written thereon signed by defendant, and dated October 15, 1884, the appearance day being the same in both notices, and the defendant appearing in court on October 21, 1884, in obedience to the notice dated October 14, and in obedience to none other, although the notice dated September 30, 1884, was then on file with said justice,—in such case can the following be held to be the law:

“(1) Can it be held that suit was commenced on September 30, 1884, and hence that the statute of limitations had not run against the note sued on when suit was brought? (2) Can it be held that the notice dated September 30, 1884, was, when the same was handed by the plaintiff to the officer, an original notice at all? (3) Can it be held that the notice dated September 30, 1884, was handed for service to the officer of the proper county? In other words, what is desired is a construction of section 3521 of the Code in reference to the voidness of a notice where no time of suit is named therein when the same leaves the hands of the justice, and where the time of suit afterwards inserted therein is more than fifteen days from the date of the notice, and where the defendant does not appear in court in obedience to such notice.

“In addition, what is also desired is a construction of section 2532 of the Code in reference to whether a constable of the township where suit is brought is the officer of the proper county in cases where none of the defendants are residents of the county of which the constable is an officer, and where none of them is served with notice in the county of which the constable is an officer.”

Section 2532 of the Code provides that “the delivery of the original notice to the sheriff of the proper county, with

intent that it may be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of the notice by another person, is a commencement of the action." This provision of the law is part of the statute of limitations, and fixes the time within which an action must be brought in order to avoid the statute, by defining what is the commencement of the action as applicable to the limitation fixed by law. It does not appear from the record before us why there was no return-day inserted in the original notice when it was delivered to the constable, nor does it affirmatively appear when or by whom the date of the return was inserted. It is shown that it was not done either by the justice of the peace or the plaintiff. It remained in the hands of the constable until after it was returned, and it appears from the abstract that he fixed the appearance day on the twenty-first day of October, and inserted that date in the notice. This was done without the knowledge of the justice of the peace or of the plaintiff. Counsel in argument say that "when notices are to be served in distant parts of the county, instead of binding the constable to serve by certain fixed days, it is left to the constable to fix a day to suit a convenience." In other words, the practice in that county is that blank original notices are delivered to the constables, and they have the authority to fill them up and complete them to suit their convenience. Such a practice may be very convenient for the constables, but it does not meet the requirements of the statute above cited, that an "original notice," and not a blank paper, shall be delivered to the officer. Suppose the officer had served the notice just as it was delivered to him: If the defendant had not appeared, a judgment against him would have been void, because the court would have had no jurisdiction over him. The plaintiff, no doubt, considered the first notice insufficient to confer jurisdiction on the justice of the peace, or he would not have caused the second notice to be issued and served. In our opinion the delivery of the blank paper to the constable was not the commencement of

Serrin et al. v. Grefe.

an action within the meaning of the law, and that no action was commenced until the second notice was delivered to the constable. This notice was dated October 14, and at that time the note in suit was barred by the statute of limitations. The defendant waived no right by appearing to answer the second notice which was served upon him. A judgment by default against him upon that action would have been valid. He could only avail himself of the statute of limitations by making a defense upon the grounds of the statute.

It appears to us that the foregoing propositions have been fully determined in principle, at least, by this court in the case of *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa, 589. We think the certificate of the trial judge shows that no action was commenced upon the note until after the bar of the statute became complete, and that the first and second questions in the certificate should have been answered in the negative. Our answers to these questions are decisive of the case, and we need not determine whether the delivery of an original notice to a constable is a delivery to the "sheriff of the proper county," as required by section 2532 of the Code.

REVERSED.

SERRIN ET AL. V. GREFE.

- 1. Riparian Rights: NAVIGABLE RIVER DECLARED NOT NAVIGABLE:**
EFFECT ON BOUNDARIES OF ADJACENT LANDS. Plaintiffs owned land adjacent to the Des Moines river, under patents from the government, which bounded the land by meandering lines following the banks of the river. When the lands were surveyed and the patents issued by the government, the river was regarded as navigable, but afterwards, by act of congress, the river was declared not to be navigable. *Held* that such act of congress did not have the effect to extend plaintiffs' boundary beyond the high-water mark to the middle of the stream, and that plaintiffs could not recover the value of ice taken from the stream by defendant. *Wood v. Chicago, R. I. & P. R'y Co.*, 60 Iowa, 456, followed.

67	196
82	516
67	196
88	396

67	196
103	210

67	196
119	156
67	196
130	607

67	196
133	440
133	457

Appeal from Polk Circuit Court.

WEDNESDAY, OCTOBER 21.

ACTION to recover the value of certain ice taken from the Des Moines river at a place where plaintiffs owned the land upon the adjacent banks. The circuit court instructed the jury to find for defendant, on the ground that plaintiffs held title to the land only to high-water mark, and that the title to the land covered by the stream between the lines of high water upon both banks is in the state. A verdict in accord with this instruction was returned, and judgment thereon rendered. Plaintiffs appeal.

Finkbine & McClelland, for appellants.

Mitchell, Dudley & Parry, for appellee.

BECK, CH. J.—I. The facts as shown by the pleadings and proof, briefly yet sufficiently stated, are as follows: (1) The assignee of plaintiffs hold title to certain lands situated upon the Des Moines river above the Raccoon forks, in the city of Des Moines. (2) The patents for the lands issued by the government describe them according to the government surveys as lots or fractions of sections. Each patent specifies the number of acres of land covered by it. (3) The Des Moines river was by the government surveys "meandered;" that is, the banks of the river were surveyed, and the lines thereof indicated by courses and distances. The boundaries of the lots and fractions of sections were indicated in this manner. (4) The plaintiffs own a mill-dam across the river adjacent to their lands, which was erected under authority derived from the state, through the proper county officers, in the manner prescribed by the statute. (5) The act of congress of August 8, 1846, declared the Des Moines river to be a public highway, and that it should ever so remain. This provision was repealed by the act of congress of January 20, 1870.

II. It cannot be doubted that the United States government at the time, and for a long time after, the lands were patented, regarded the Des Moines river as a navigable stream. Surely the patentee of the land acquired no other rights than those held by a riparian owner of lands adjacent to a navigable stream. In this view his title extended no further than the bank as "meandered" by the survey, or to the actual high-water line. It is impossible to discover any legal principle which would require us to hold that the act of congress repealing the former act declaring the stream to be navigable would extend the title of the patentee so that his land would be bounded by a line following the middle of the stream. This precise point is decided by this court in *Wood v. Chicago, R. I. & P. R'y Co.*, 60 Iowa, 456, wherein we held that the identical act of congress in question had no such effect. The plaintiffs, then, have the rights, and no others, of riparian owners of land adjacent to a navigable stream. They do not claim that as such they have the exclusive right to the ice found in the river in front of their lands.

III. Their claim is based upon the position that the river is not navigable, and that their lands, being bounded by it, extend to the middle of the stream. It will be observed that the patents do not bound the lands by the river. They described the lands according to the surveys which meandered the banks. It is plain that these meandered lines constitute boundaries of the lands, and the title of the bed of the stream remained in the government, if it is subject to sale.

We find it unnecessary to follow counsel for plaintiff in their learned and ably presented argument discussing many doctrines of the law relating to the subject of the navigability of rivers, the rights of riparian owners, and the like. Upon the controlling points of the case, see *La Plaisance Bay Harbor Co. v. City of Monroe*, Walk. Ch., 155; *Barney v. Keokuk*, 94 U. S., 324; *Wood v. Fowler*, 26 Kas., 682.

In our opinion the judgment of the circuit court ought to be

AFFIRMED.

THE CENTRAL IOWA R'Y CO. v. THE BOARD OF SUPERVISORS ET AL.

1. **Taxation: IMPROVEMENTS ON REAL ESTATE AFTER ASSESSMENT.** Improvements placed on real estate after assessment escape taxation until the lands are again assessed, two years later. Code, § 812. *Richards v. Wapello County*, 43 Iowa, 507, followed.
2. **Statutes: CONFLICT: RULE OF CONSTRUCTION: TAXATION OF RAILROADS.** Where there are two statutes which relate to the same subject matter, they should be construed, if it can reasonably be done, so that both may have force and effect. Under this rule, the statute providing for the assessment of railroad property in March of each year (Code, § 1317) is not in conflict with the statute (Code, § 812) providing for the assessment of real estate in January of each alternate year.
3. **Railroads: TAXATION OF: CODE, § 1317: CONSTITUTIONALITY: UNIFORM OPERATION OF LAWS.** Section 1317 of the Code, providing for the assessment of railroads every year, while real estate is assessed only every alternate year, *held* not repugnant to article 1, § 6, of the constitution of Iowa, nor to the fourteenth amendment to the constitution of the United States, as discriminating against railroads.

Appeal from Wright Circuit Court.

THURSDAY, OCTOBER 22.

ACTION to restrain the collection of certain taxes. The relief asked was granted, and the defendants appeal.

Nagle & Birdsall, for appellants.

J. H. Blair and N. C. Daly, for appellee.

SEEVERS, J.—The construction of a railway in Wright county was commenced in May, 1881, and completed in November of that year. About seventy-nine acres of land are owned and used by the company as right of way. This land was assessed on the first day of January, 1881, to the then owners at the rate of five dollars per acre, and if assessed to the plaintiff at the same rate the total amount thereof would be \$395. The length of the road in the

67	199
82	349
67	199
96	241
67	199
109	612
67	199
114	382
67	199
128	463
67	199
131	349
67	199
137	489

county is slightly more than six miles. The executive council assessed the plaintiff on its said road at the rate or value of \$2,000 a mile, the total assessment being upward of \$12,000; and upon such valuation the defendants levied taxes for the year 1882.

I. The plaintiff insists that the taxes so levied are illegal, because the right of way of defendant, which was the basis of the levy, is real estate, and that real estate can only be taxed upon the valuation fixed thereon on the first day of January in each odd-numbered year. Code, § 812; *Richards v. Wapello County*, 48 Iowa, 507. That the statute so provides as to the assessment of real estate must be conceded. The effect is that improvements placed upon real

1. TAXATION: estate after the assessment escape taxation until improvements on real lands are again assessed, two years later. But it is further provided by statute that all property belonging to railway corporations used in the operation of the railway shall be assessed in March of each year by the executive council. Code, § 1317. If the appellee's construction of these two statutes is adopted, then the last-mentioned statute to an extent ceases to be operative.

The settled rules for the construction of statutes which have prevailed in all courts for many years forbid that such

2. STATUTES: a construction should be adopted. It is a fundamental canon of construction that when there are conflict: rule of construction: taxation of railroads. two statutes which relate to the same subject-matter they should be construed, if it can reasonably be done, so that both may stand and have force and effect. It is not claimed, and we apprehend it cannot be successfully maintained, that it is not competent for the general assembly to provide that certain species of property shall or may be assessed by one officer, and other kinds of property assessed by some other officer or tribunal. It is equally competent for the legislature to provide that one kind of property shall be assessed once in every two years, and another kind assessed every year. Now, this is the whole object and scope of the

two statutes in question. It is required that railway property shall be assessed each year by a tribunal named in the statute. As the statute relates to a particular kind of property, and does not necessarily conflict with any other statute, it cannot be nullified by the courts, but should and must be enforced, unless it is unconstitutional, which counsel for the plaintiff contend it is, if construed as above stated.

II. It is insisted that section 1317 of the Code as construed is unconstitutional, because it is in conflict with arti-

3. RAILROADS:
taxation of :
Code, § 1317:
constitution-
ality : uni-
form opera-
tion of laws.

cle 1, § 6, of the constitution of this state, and with the fourteenth amendment of the constitution of the United States. The former provides that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not belong to all the citizens; and the argument, in substance, is that individuals, and corporations other than railway corporations, escape, or may escape, for at least one year, taxation on improvements placed on real estate, and therefore the statute in question discriminates against the latter class of corporations. All railway property is assessed by the same tribunal and in the same manner, and all such corporations have the same privileges and immunities, and are subject to the same burdens, so far as taxation is concerned. We think it is competent, and not in conflict with any provision of the constitution of this state or of the United States, for the state to provide that any particular class of property belonging to all corporations of the same character, and which possess the same rights and privileges, may be assessed in the same manner and by the same tribunal, and that the property of individuals and other corporations may be assessed by other officers and at different times. But, be this as it may, it is, we think, competent for the general assembly to provide that, for the purpose of taxation, all railroad property should be regarded as personal and taxed accordingly. Cooley, Tax'n,

Rook v. Jameson.

273, 274. This being so, the statute in question cannot be regarded as unconstitutional, because all personal property of all persons and corporations must be assessed each year. It is true that the statute does not in terms provide that the right of way shall be assessed as personalty, but it is provided that it shall be assessed each year as is other personal property. It is fundamental that a statute should not be declared unconstitutional unless it is clearly so. All railroad property of every kind and description, for the purpose of taxation, is regarded as of the same character, including the gross earnings of the road. The whole mass of such property, under the statute, may be regarded as real or personal property for the purposes of taxation; and, if essential to the validity of the statute in question, it should be regarded as personal property.

REVERSED.

ROOK V. JIMESON.

1. **Agency to Sell Land: DEFECTIVE POWER OF ATTORNEY: RATIFICATION OF SALE AND RECEIPT OF PROCEEDS: SPECIFIC PERFORMANCE.** Where A. had a power of attorney from defendant, but it was not sufficiently broad to cover the sale of land, though intended for that purpose, but it appeared from other evidence that A. had parol authority from defendant to sell the land in question as her agent, and he did sell it, and paid the proceeds to defendant, *held* that she could not avoid a specific performance on the ground that the power of attorney was defective, because she was bound by the parol authority, upon which the action for specific performance was based.

Appeal from Henry Circuit Court.

THURSDAY, OCTOBER 22.

THIS is an action in equity, by which plaintiff seeks to enforce the specific performance of an alleged contract for the

sale of real estate. The defendant denies that she entered into any such contract with the plaintiff. There was a trial to the court, which resulted in a decree for the defendant. Plaintiff appeals.

Ambler & Campbell and D. B. Stubbs, for appellant.

L. G. & L. A. Palmer, for appellee.

ROTHROCK, J.—The defendant is the widow of H. H. Jimeson, deceased. At the time of his death he was the owner of a farm of about 150 acres. All of the farm excepting about fifty acres was mortgaged to one Weir. The defendant joined with her husband in the execution of the mortgage. After the death of H. H. Jimeson the defendant went to the state of Nebraska. Joseph H. Ault, her son, was residing in Nebraska, and he returned to Henry county, and, assuming to act for her, he sold her dower interest in the land to the plaintiff, who paid him \$160 therefor. Afterwards the mortgage held by Weir was foreclosed, and all that part of the land included in the mortgage was exhausted in the payment of the mortgage. This disposition of the land reduced the claim of the defendant to her dower interest in the remaining fifty acres. It is clearly shown by the proof that the plaintiff made the contract for the purchase of the land with Joseph H. Ault, and that he paid him the purchase money in full. It also appears that the defendant executed a power of attorney to Ault, authorizing him to attend to all her business pertaining to the settlement of the estate. This power of attorney did not contain any express authority to sell and convey real estate. The defendant admits in her answer that she received the \$160 paid by the plaintiff, but claims that it was for her interest in the personal estate of her husband, which Ault sold to the plaintiff. The proof shows that Ault did not sell the personal estate, but that he sold the real estate.

The question of fact to be determined is, was Ault author-

The State v. Breckenridge.

ized by the plaintiff to make a contract for the sale of the defendant's interest in the real estate? Neither Joseph H. Ault nor the defendant was examined as a witness in the case. It appears from the evidence that the defendant intended to execute a power of attorney to her son which would authorize him to sell and convey the land. This power was defective. But the proof is very clear that she intended that he should sell the land. This appears plainly from her declarations to others. She received the consideration paid to her son for the land, and still retains it, without any offer to return it. She does not defend the action upon the ground that the consideration she has received is grossly inadequate. And, indeed, the proof shows that the sale could not be avoided on this ground. In our opinion the court below should have entered a decree for the plaintiff. And it is proper to observe that the plaintiff does not ground his demand for a specific performance upon the defective power of attorney; and he does not seek to explain it by parol evidence. His action is based upon the parol authority given by the defendant to her son to sell the land.

REVERSED.

THE STATE V. BRECKENRIDGE.

1. **Criminal Law:** **UTTERING FORGED NOTE: EVIDENCE OF THE POSSESSION OF OTHER LIKE NOTE.** On the trial of an indictment for uttering a forged note, after the state had introduced evidence tending to show that the note was forged, it was allowed, against defendant's objection, for the purpose of showing that defendant knew that it was forged, to introduce the evidence of a witness who testified that defendant had, about the time the alleged crime was committed, another forged note purporting to be signed by the same persons, which he had seen, and that the signatures to it were, in his opinion, in the same handwriting as those to the note referred to in the indictment. *Held* that it was error to admit such testimony without the production of the note referred to by the witness.

REED and ROTHROCK, JJ., *dissenting*.

Appeal from Audubon District Court.

THURSDAY, OCTOBER 22.

THE defendant was convicted of the crime of uttering and publishing a forged promissory note with intent to defraud. Judgment having been rendered upon the verdict, he appeals to this court.

Andrews, Stotts & Myers and Griggs, Brainard & Griggs,
for appellant.

A. J. Baker, Attorney-general, for the State.

ADAMS, J.—The note alleged to be forged purported to be signed by T. Bartley and James Bartley. The state introduced evidence tending to show that the note was forged, and afterwards, for the purpose of showing that the defendant had knowledge that it was forged, it attempted to show that at or about the time of the transaction in question the defendant had in his possession another note purporting to be signed by T. Bartley and James Bartley, and that it was forged. The note was not produced, but one Campbell was called by the state as a witness, and was allowed, against the objection of the defendant, to testify in relation to such note. His testimony was to the effect that he had seen such note, and that in his opinion the signatures to it were in the same handwriting as the signatures to the note upon which the indictment is based.

In allowing such evidence without the production of the note, we think that the court erred. If the note had been produced, it may be that a mere comparison of the signatures would have been sufficient to rebut Campbell's testimony. But if not, it was the defendant's privilege to examine witnesses in regard to the genuineness of the signatures, and the production of the note was necessary for this purpose.

We do not say that Campbell's testimony would have

The State v. Breckenridge.

been admissible if the note had been produced. Upon that question we might not be agreed, but we are clear that it was inadmissible without the production of the note.

Some other questions are presented, but they are not of such a character as to arise upon another trial. For the error pointed out the case must be remanded.

REVERSED.

REED, J., *dissenting*.—The holding of the majority is that the state was not entitled to introduce in evidence the opinion of the witness Campbell that the signatures to the note to which he referred were in the same handwriting as the signatures to the instrument on which the indictment is based, for the reason that the note was not produced, and a comparison of the signatures could not be made, and other witnesses could not be examined with reference to the genuineness of the signatures to said notes. The evidence shows that defendant had the note in his possession and delivered it to the witness Campbell (who is cashier of a bank) as collateral security, and that it was obtained from the witness by defendant's wife after the indictment was found. The state, therefore, could not produce it, as it could not compel either the defendant or his wife to deliver it up, or produce it on the trial. It is, therefore, under the rule laid down by the majority, deprived of important testimony because it cannot produce the instrument to which it refers; the instrument being in the possession or under the control of the defendant. In my opinion such a rule ought not to obtain in any case. It enables the accused to deprive the state of testimony having an important bearing on the case, simply by suppressing or destroying the instrument to which it relates. It is not essential to the protection of any of the legal rights of the accused, and its only effect is to embarrass or defeat the administration of justice. The rule is not only without the support of reason, but, so far as my examination has gone, finds no support in the authorities.

ROTHROCK, J., concurs in this dissent.

BOLTON v. McSHANE.

1. **Trespass: INJUNCTION TO PREVENT: WHEN ALLOWED.** A mere trespass will not be restrained by injunction when the injury will not be irreparable, and the trespasser is solvent, and adequate compensation in damages may be recovered by law; but if the injury will be irreparable chancery will interfere by injunction to prevent it.
2. **Road Supervisors: ACTS OF CONTROLLED BY INJUNCTION: GROUND OF EQUITABLE INTERFERENCE.** Equity will interfere by injunction to restrain road supervisors from removing or interfering with fences, hedges, water-courses, and the like, in the discharge of their official duties. (See cases cited in opinion.) Relief in these cases is not based upon the irreparable character of the injury and the insolvency of the defendant, but on sound views of public policy, and is for the protection of the officer as well as of the private citizen.

Appeal from Linn District Court.

THURSDAY, OCTOBER 22.

ACTION in chancery to restrain defendant from interfering with or removing a fence. A demurrer to the petition was sustained. Plaintiff appeals.

George W. Wilson, for appellant.

Davis & Brooks, for appellee.

BECK, CH. J.—I. The petition alleges substantially that plaintiff is the owner of a tract of land, along the line of which is a public highway, which has been used by the public since plaintiff acquired the land in 1865; that plaintiff, about sixteen years before the commencement of this suit, erected a fence along the line of this highway, which has ever since been maintained by him, and that defendant, as a supervisor of highways, threatens to remove the fence, and has caused a written notice signed by him as supervisor to be served upon plaintiff, a copy of which is made an exhibit to the petition,

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82	677
67	207
92	125
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97	383
67	207
103	230
67	207
107	497

Bolton v. McShane.

requiring plaintiff to remove the fence, and informing him that if the requirement is not complied with within eleven days the defendant himself will remove it. It is also alleged that defendant, if not restrained by injunction, will remove the fence which would open plaintiff's inclosure, and expose to waste his crops, shrubs and trees, thus working to him an irreparable injury. A demurrer to the petition, on the ground that the facts stated therein do not entitle plaintiff to the relief demanded, was sustained.

II. It is a familiar doctrine that the commission of a mere trespass will not be restrained by injunction when the injury would not be irreparable, the trespasser is solvent, and adequate compensation for the injury in damages may be recovered by law. But if the injury be irreparable, chancery will interfere by injunction. See 2 Story, Eq. Jur., § 928, and notes. The petition alleges that the injury which will result from the threatened act of defendant will be irreparable. It therefore shows ground of relief in equity.

III. But there are other reasons against the correctness of the ruling of the district court. The petition and exhibit clearly show that defendant is threatening to remove the fence in his official capacity as supervisor of highways. There are numerous cases in this court wherein equity has interfered by injunction to restrain road supervisors and others from removing or interfering with fences, hedges, water-courses, and the like, in the discharge of their official duty. Relief in these cases was not based upon the grounds of the irreparable character of the injury and the insolvency of the defendants. Without attempting to cite all of these cases, we refer to the following which we now remember: *Bills v. Belknap*, 36 Iowa, 583; *Grant v. Crow*, 47 Id., 632; *McCord v. High*, 24 Iowa, 336; *Quinton v. Burton*, 61 Iowa, 471.

We think it has been for a long time the practice in this state to control by injunction the acts of road supervisors in

1. TRESPASS:
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when al-
lowed.

2. ROAD SU-
pervisors:
acts of con-
trolled by in-
junction:
ground of
equitable in-
terference.

cases of this kind. The practice certainly has the support of sound reason, based not only upon the thought of protection to the rights of the parties who may be injured by the acts, but also upon the necessity of protection to the supervisors themselves. Such an officer may be required in the discharge of his duty to remove a fence or hedge, or do other acts whereby he may encroach upon the inclosure adjacent to the highway. The owner of the land, as in this case, may insist that his fence is upon the line of the highway. If the supervisor proceeds to remove the fence he would be personally liable in an action to the owner, if it should be determined that the fence was on the line of the road, for he would not be protected by the fact that he believed the contrary and acted in good faith. Justice and sound public policy demand that for the protection of both the landowner and the supervisor the question of the legality of the supervisor's proposed act should be determined before the injury should be done to the farm, and the liability of the latter should be incurred. The law provides a remedy for the settlement of the controversy between the parties, in advance of the injury to the one and the liability incurred by the other, by an action in chancery, wherein an injunction will suspend the act of the supervisor until the questions of law and facts involved in the controversy are judicially settled. This is in accord with justice and public policy. In support of our conclusion, see *Hil. Inj.*, 486, and cases cited.

It may be urged against this doctrine that while the proceedings are pending the public would be deprived of the use of the road. But this objection is of little force. The public must always wait, as do individuals in like cases, for the settlement of its rights in a legal way before it assumes to exercise them, in all cases where these right are disputed. In the case at bar the petition shows that for fifteen years the public, through its officers, has acquiesced in the location of plaintiff's fence. It can surely endure deprivation of the

The City of Des Moines v. Gilchrist et al.

road a little longer while the question of the proper location of the fence is being settled by the court.

We reach the conclusion that the district court erred in sustaining the demurrer to plaintiff's petition. The cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

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THE CITY OF DES MOINES V. GILCHRIST ET AL.

1. **Cities and Towns: MODE OF EXERCISING POWERS GRANTED TO: STATUTE MUST BE FOLLOWED: ESTABLISHING FIRE LIMITS.** Where a power granted to a municipal corporation is directed to be exercised through certain means or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner. Accordingly, a city cannot prohibit the erection of wooden buildings within certain limits except on petition of the owners of two-thirds of the grounds included in any square or block, as provided by Code, § 457. Compare *City of Keokuk v. Scroggs*, 39 Iowa, 447.
2. —: **FIRE LIMITS: PROHIBITION OF LUMBER YARDS WITHIN.** There is no statute authorizing a city to prohibit the establishment and maintenance of lumber yards within the established fire limits.

Appeal from Polk District Court.

THURSDAY, OCTOBER 22.

THE defendants were charged by information before the police court of the city of Des Moines with the violation of a city ordinance, by erecting wooden buildings and maintaining a lumber-yard within the fire limits of the city. They pleaded not guilty. A trial was had, and the defendants were found guilty, and they appealed. Upon a trial in the district court the defendants were convicted of erecting wooden buildings within the fire limits, and acquitted of the charge of establishing and maintaining a lumber-yard within the said limits, upon the ground that the city council had no

power under the statute to prohibit the erection and maintenance of lumber-yards within the fire limits. Both parties appeal.

Williamson & Kavanaugh, for plaintiff.

Barcroft & Bowen, for defendant.

ROTHROCK, J.—I. Section 482 of the Code is as follows:
 “Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of said corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.”

It is further provided by statute that cities “shall have power to make regulations against danger from accidents by fire, to establish fire districts, and, on petition of the owners of two-thirds of the grounds included in any square or block, to prohibit the erection thereon of any building or addition to any building, unless the outer walls thereof be made of brick and mortar, or of iron and stone and mortar, and to provide for the removal of any buildings or additions erected contrary to said prohibitions.” Code, § 457.

The ordinance under which the prosecution against the defendants is sought to be maintained provides that it shall be unlawful for any person within certain limits to “erect any building, or addition to any building, not made and built with outer walls composed of iron, stone, brick and mortar, or other non-combustible material; and all persons are hereby forbidden from hereafter erecting or establishing any building within said limits, the outer walls of which are

composed of wood or other combustible material, or from keeping or maintaining any lumber-yard or wood-yard within said limits."

It is conceded that the ordinance establishing fire limits was passed without the petition of the owners of two-thirds of the ground included in squares or blocks within the limits fixed by the ordinance, and the important question in the case is, was such petition necessary to give the city council authority to fix fire limits?

It is claimed by counsel for the plaintiff that the power is given in that part of section 457, above cited, which authorizes the council to make regulations against danger from accidents by fire, and to establish "fire districts." And it is sought to construe the term "fire districts" the same as if the words "fire limits" were used. We do not think any such construction can fairly be placed upon the law. These terms are not convertible nor interchangeable. The words "fire districts" are used to authorize the division of the city into districts for the better and more efficient service of the fire department in the extinguishment of fires. That it was so understood by the counsel of the city of Des Moines is made manifest by the fact that the council established two fire districts, and fixed their boundaries. Another and very cogent reason why the words "fire districts" are not to be construed as "fire limits" is that, in the same section of the statute, the manner in which fire limits are to be established is specifically designated: that is, by the petition of the owners of two-thirds of the grounds in the respective blocks.

It is further claimed that the city council is authorized to fix fire limits under the general provisions of section 482 of the Code. It may be that the point would be well taken if it were not for the provision in section 457 prescribing the requirements necessary to the exercise of the power. It is a general principle of the law that the specific designation of the manner of exercising a power granted operates as a limitation upon the general power conferred; or, as is said in the

case of *City of Keokuk v. Scroggs*, 39 Iowa, 447: "When a thing is directed to be done through certain means or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner." In *Pye v. Peterson*, 45 Tex., 312, S. C., 23 Amer. Rep., 608, it was held that a city cannot, without express authority in either its charter or by its statute, establish fire limits and declare wooden buildings within such limits to be nuisances. That case is in its facts very much like the case at bar, so far as it relates to the erection of the wooden buildings by the defendants. We think that upon this branch of the case the court erred in holding the defendants liable for the erection of the buildings at their lumber-yard.

II. The court below held that the defendants were not liable to punishment under the ordinance for the erection and maintenance of a lumber-yard within the city.
 2. — : are limits: prohibition of lumber yards within. This ruling, doubtless, was made upon the authority of the case of *City of Keokuk v. Scroggs*, above cited. It appears to us that the case is decisive of this question. The city of Keokuk was organized under a special charter. Its general powers were as broad and full as the power granted to cities under section 482 of the Code. There was an amendment to the charter granting specific powers for the purpose of guarding against calamities by fires. The city passed an ordinance for the prevention of fires, in which it prohibited certain acts not enumerated in the special provisions in the amendment. It was held that the ordinance was void.

It seems to us that case is identical with this in principle. We are content to follow it without further elaboration. Our conclusion is that the judgment of the court below should be affirmed on plaintiff's appeal, and reversed on defendants' appeal.

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ARNOLD BROS. v. KREUTZER & WASEM.

1. **Appeal to Supreme Court: FROM JUDGMENT ON DEMURRER.** Plaintiff demurred to the answer, and the demurrer was overruled, and, plaintiffs refusing to plead further, the case was dismissed, and judgment for costs rendered against the plaintiffs. *Held* that an appeal would lie from such judgment. Code, § 3164.
2. **Contract: AGREEMENT NOT TO ENGAGE IN BUSINESS: ACTION FOR BREACH OF: INSUFFICIENT ANSWER.** An answer in an action for the breach of an agreement not to engage in a certain business at a certain place, during a time named, considered, (see opinion,) and *held* to present no defense to the action, and that a demurrer thereto should have been sustained.
3. ———: ———: **CONSIDERATION FOR.** The purchase by plaintiffs of a stock of goods from defendants was a good consideration for an agreement on the part of defendants, made in the same transaction, that they would not engage in the sale of like goods at the same place during a certain specified time.
4. ———: ———: **VALIDITY: PUBLIC POLICY.** A contract not to engage in a certain business, at a certain place, within a specified time, is not void as being against public policy. See *Hedge v. Lowe*, 47 Iowa, 137.

Appeal from Marshall Circuit Court.

THURSDAY, OCTOBER 22.

ACTION upon a written contract for a breach of a covenant therein contained, obligating defendants not to engage in the furniture business for a time and at a place specified therein. A demurrer to an answer of defendants was overruled, and, plaintiffs standing upon their demurrer, the case was dismissed. Plaintiffs appeal.

E. J. Arnold and *J. H. Bradley*, for appellants.

Binford & Snelling, for appellees.

BECK, CH. J.—I. The parts of the contract necessary to an understanding of the case are as follows:

“This agreement, made the twenty-second of February, A.

Arnold Bros. v. Kreutzer & Wasem.

d. 1878, between Kruetzer & Wasem and Arnold Brothers, all of Marshalltown, Marshall county, Iowa, witnesseth that the said Kruetzer & Wasem, for the consideration hereinafter specified, agree to sell to the said Arnold Brothers, and the said Arnold Brothers agree to buy of the said Kreutzer & Wasem, all the stock of furniture belonging to the said Kreutzer & Wasem now being in the store occupied by them at No. 19, North Center street, in Marshalltown. * * *

“In consideration of the premises, the said Arnold Brothers agree to pay to the said Kreutzer & Wasem five hundred dollars April 1st, and to execute and deliver to Kreutzer & Wasem, as and for the purchase money of the balance of the above-mentioned property, and in full payment therefor, their promissory notes, with approved security, of two hundred dollars each, payable every sixty days thereafter, with ten per cent interest from April 1, 1878; first note payable June 1, 1878; second, August 1st; and so on every sixty days.

“And the said Kreutzer & Wasem further agree to and with the said Arnold Brothers that they will not at any time hereafter (until the expiration of said lease) engage, directly or indirectly, or concern themselves in carrying on or conducting the furniture business as retail dealers, or wholesale to any parties (other than Arnold Brothers) any goods such as they now or may hereafter manufacture, within two miles of the premises now occupied by them as aforesaid for such purpose.

“And the said Kreutzer & Wasem agree to furnish, for one year from April 1, 1878, to Arnold Brothers all staple goods, such as they now or may hereafter manufacture, that the said Arnold Brothers may require in their business, at lowest cash prices established, or that may hereafter be established, by any of the following firms: Forest City Furniture Co., of Rockford, Illinois, Frank Hayer, J. Koeing & Co., or Swan & Clark, of Chicago, all being furniture dealers, or any other first-class, reliable furniture dealers,—less freight from their respective houses to Marshalltown. Said goods to be furnished

Arnold Bros. v. Krentzer & Wasem.

Arnold Brothers by the said Krentzer & Wasem as fast as they may need the same, reasonable notice being given to the said Krentzer & Wasem of the time said goods will be required. * * *

"The security above spoken of is to consist of a chattel mortgage of the goods purchased by Arnold Brothers of said Krentzer & Wasem, now in said Krentzer & Wasem's store. Said mortgage is to be placed in the city bank, to be recorded *only* upon failure of said Arnold Brothers to pay the said notes when due."

The action is brought upon the third paragraph of the contract as set out above. The defendants answered the petition in the following language:

"Come now defendants, and, for answer to plaintiff's petition, state:

"(1) Defendants admit the execution of the contract sued on, but aver that said contract was for a long time lost; that these defendants understood and believed that the covenant therein contained, for the breach of which this suit was brought, expired in one year from April 1, 1878, and that for such year they kept said covenants in good faith, and that thereafter they sold their manufactured goods at wholesale, the same as if said contract had never been executed. Further answering, defendants deny that plaintiffs are damaged in any sum whatever by reason of the violations of said contract by defendants, as alleged in said petition, or in any other manner.

"(2) Defendants aver that plaintiffs have failed to perform the conditions of said contract required of them to be performed before plaintiffs could ask or require that defendants should perform the covenants sued on, or sue for a breach thereof, in this: Said plaintiffs covenanted, as a condition precedent, to buy the stock of defendants in a certain building, and pay five hundred dollars cash on a certain day, and pay the balance, two hundred dollars every sixty days until the entire amount was paid, and also agreed to secure

said deferred payments by a mortgage on the stock sold. And these defendants aver that said plaintiff neglected and refused to secure said deferred payments, or any portion thereof, by a mortgage, or otherwise, whereby said violation was a sufficient reason for defendants' refusal to comply with the covenant. And said plaintiffs further agreed, by the terms of said contract set out in plaintiffs' petition, that for one year from April 1, 1878, they would purchase of these defendants all staple goods that they (Arnold Brothers) might require in their business, of the kind that these defendants were then or might thereafter manufacture, all of which will appear by reference to the contract set out in plaintiffs' petition. And these defendants aver that the plaintiffs neglected and refused to buy of these defendants from April 1, 1878, to April 1, 1879, all the staple furniture they required in their business of the kind manufactured by these defendants, and refused to buy of these defendants any goods, save a small portion of such furniture as was required by them in their business, and on the contrary purchased such furniture of foreign manufactories; wherefore and by reason of which these defendants were and are released from the covenants for the breach of which this suit is brought.

"(3) Defendants say there was no consideration for that portion of the covenant whereby defendants agreed not to engage in selling goods at wholesale within two miles of the premises leased of defendants by plaintiffs; wherefore and by reason of which said contract is void, so far as it relates to the sale of goods at wholesale.

"(4) Defendants, for further answer, aver that said contract is illegal and void, because it is against public policy and in restraint of trade; that the same tends to create a monopoly, in this: Said contract binds defendants not to sell any furniture of their manufacturing within two miles of the premises described in the lease to plaintiff set out in the petition, while plaintiffs are not required to buy any furniture of defendants of their manufacture, except for one

year out of the five years in which defendants are prohibited from selling as above; whereby it is left optional with plaintiffs to allow the manufactured goods of defendants to be sold in the city of Marshalltown, Iowa; that Marshalltown is a city of ten thousand inhabitants, and has now, and for many years last past has had, three large retail furniture stores within her limits."

The plaintiff demurred to the answer upon grounds which we shall hereafter consider. The demurrer was overruled, and, plaintiff refusing further to plead, the case was dismissed, and judgment for costs rendered against plaintiff.

II. Counsel for defendants insist that there is no judgment in the case from which the plaintiffs can appeal. We think differently. The order affected a substantial right of the plaintiffs, as it, in effect, held that the matters pleaded in the answer constituted a defense to the action. In such a case the statute provides for an appeal. Code, § 3164. An appeal would lie even had no judgment been rendered other than a decision sustaining the demurrer. *Cowen v. Boone*, 48 Iowa, 350.

III. In our opinion the demurrer should have been sustained. It assailed the first count of the answer on the ground (1) that it admitted the violation of the conditions of the contract for which the action is brought; (2) it set up defendants' understanding and belief of the effect of the contract; and (3) it pleads a conclusion to the effect that defendants sustained damages by the violation of the contract without showing facts upon which the conclusion is based. It is surely not necessary to support with argument or authorities our conclusion that this count is obnoxious to the objections thereto made by the demurrer.

IV. The first clause of the second count of the answer does not allege that defendants sustained injury or loss by reason of the failure of plaintiff to execute the mortgage. The plaintiffs may have paid the notes. If that had been

1. APPEAL to
supreme
court: from
judgment on
demurrer.

2. CONTRACT:
agreement
not to engage
in business:
action for
breach of: in-
sufficient an-
swer.

done, no damage could have accrued by the failure to execute the mortgage. This thought should have been negatived by the answer.

V. The second paragraph of the second count of the answer sets up an agreement of the plaintiff to purchase goods of defendants. But the contract does not obligate plaintiffs to buy goods, it only binds defendants to furnish such goods as plaintiffs may require. It clearly leaves it to the option of plaintiffs to purchase goods of defendants. Objections to this count of the answer were raised by demurrer based upon these grounds.

VI. The third count alleges that there was no consideration for the covenant of the defendants not to engage in 3. — : — : trade. The consideration for this covenant is consideration for. found in the covenants of plaintiff set out in the contract, and, besides, defendants' covenant, being in writing, imported a consideration. Code, § 2113. This count was assailed by the demurrer.

VII. The fourth count of the answer sets up that the contract, in so far as it binds defendants not to engage in 4. — : — : trade as stipulated in the contract, is against validity: public policy. public policy, being in restraint of trade, and therefore void. But contracts of the character of the covenant in question are held by this court to be valid. See *Hedge v. Lowe*, 47 Iowa, 137. This count was assailed by the demurrer upon the grounds we have stated.

The foregoing discussion disposes of all questions in the case. The judgment of the circuit court is

REVERSED.

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THE STATE V. DIETZ.

1. **Criminal Evidence: CORROBORATION OF ACCOMPLICE: WHAT IS SUFFICIENT: QUESTION FOR JURY.** A conviction cannot be had on the testimony of an accomplice, unless it is corroborated by other testimony tending to connect the defendant with the commission of the offense. Code, § 4559. But where there is such testimony, its sufficiency is for the jury to determine. Upon consideration of the corroborating evidence in this case, *held* that the jury was warranted in bringing in a verdict of guilty of murder.

Appeal from Benton District Court.

THURSDAY, OCTOBER 22.

THE defendant was indicted and convicted of the crime of murder, and sentenced to be imprisoned in the penitentiary for twenty years, and he appeals.

John Mitchell, for appellant.

A. J. Baker, Attorney-general, for the State.

SEEVERS, J.—W. B. Hower was murdered by means of poison administered to him by his wife. The defendant was indicted and convicted on the theory that he was an accessory before the fact. Anna L. Hower, the widow of the deceased, had been convicted prior to the trial in this case, and she testified as a witness for the state, on the trial of the defendant, that he procured the poison, and advised her to give it to the deceased; and the only question we are required to determine is whether she was sufficiently corroborated by evidence which tends to connect the defendant with the commission of the offense. Code, § 4559.

The poison was administered and the death occurred in Marion, Linn county, in this state. The defendant at that time resided in Illinois, where Mrs. Hower and her husband

resided a short time before they became residents of this state. The evidence tended to show that Mrs. Hower and the defendant were criminally intimate in the state of Illinois. The deceased suspected such intimacy, and the evidence tends to show that defendant had knowledge of such fact. The deceased and his wife left Illinois on or about the sixth day of July, and she had an interview with the defendant on that day; and, as she testified, the plan was then agreed upon, and the poison procured. That such an interview took place is a conceded fact. The poison was administered on the ninth day of July, and on the twelfth Mrs. Hower telegraphed the defendant at Lanark, Illinois, as follows:

“Still living. No better. Come at once.

“WILLIAM LAWRENCE.”

Unless there had been some prior understanding between the defendant and Mrs. Hower, it is preposterous to suppose she would have signed the name she did to the telegram. On the same day the telegram was sent the defendant arrived at Marion, and had an interview with Mrs. Hower, and they went to Cedar Rapids, stayed all night at a hotel, and occupied the same bed-room. Whether the defendant came in response to the telegram does not appear. Mrs. Hower testified that she wrote a letter to the defendant on Tuesday, and the telegram was sent on the following Thursday. But whether the defendant came to Marion in response to the letter does not appear. The jury, however, would be warranted in finding that a sufficient time had elapsed to have enabled the defendant to reach Marion after the receipt of the letter, if he received it in due course of mail.

If there is evidence which corroborates the accomplice, and tends to connect the defendant with the commission of the offense, its sufficiency is for the jury to determine. The criminal relations between these parties in Illinois; the presence of the defendant in Marion, either on his own motion or because Mrs. Hower requested it; the going to Cedar Rapids, and what took place there,—tend to corroborate the

Ellsworth v. Van Ort.

evidence of the accomplice, and connect the defendant with the commission of the offense. The poison was administered and the telegram was sent by Mrs. Hower. It clearly implies that the killing of the deceased had been discussed, and the manner of communication arranged. The presence of the defendant at Marion is entitled to great weight, and the only explanation given by counsel for the defendant is that the latter came for the purpose which was, in all probability, accomplished at Cedar Rapids. It was, however, for the jury to say whether this was his only purpose.

Our conclusion, after a careful consideration of the whole record, is that the judgment must be

AFFIRMED.

ELLSWORTH V. VAN ORT.

1. **TAX SALE AND DEED: NOTICE TO REDEEM: PROOF OF SERVICE OF: STATUTE MUST BE FOLLOWED.** The provision of § 894 of the Code, that the notice of the expiration of the time for redemption shall be served upon residents of the county "in the manner provided by law for the service of original notices," prescribes only the *manner* of service, and not the person or officer who shall make the service or the return of service; and service and return by the sheriff of the county in the manner in which original notices are served and returned are not sufficient to warrant the treasurer in issuing a tax deed ninety days after such notice and return are filed in his office. The further provision of said section, that "service shall be deemed completed when an affidavit of the service of such notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer," must be complied with before a valid deed can be issued.

Appeal from Sioux District Court.

THURSDAY, OCTOBER 22.

PLAINTIFF obtained a tax deed to a quarter section of land in Sioux county, and he brought this action in equity to quiet

67	229
91	358
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105	476
67	222
4120	118

Ellsworth v. Van Ort.

the title thereto. Defendant was in possession of the land at the time the tax deed was executed, and held the fee title. The only defense interposed is that the right of redemption from the tax sale had not expired when the deed was executed. Defendant also pleads a tender of the amount necessary to redeem, and prays that the deed be canceled, and that his right to redeem the premises be established. The district court dismissed plaintiff's petition, and granted defendant the relief demanded in the answer. Plaintiff appeals.

Struble, Rishel & Sartori and *John F. Duncombe*, for appellant.

Bell & Palmer and *Finley Burke*, for appellee.

REED, J.—After the expiration of two years and nine months from the date of the sale, plaintiff caused the notice prescribed by section 894 of the Code to be served on defendant. The notice was served by the sheriff of the county, and he indorsed a return thereon showing the date of the service and the manner in which it was made, which was by reading the notice to defendant and delivering a copy thereof to him. The notice and return were then filed in the office of the county treasurer, and after the expiration of ninety days from the date of such filing the deed was executed, the sheriff's return being the only evidence on file at that time that the notice had been served.

The question in controversy between the parties is whether the treasurer, on this state of the record, had authority to execute the deed. Section 894 of the Code is as follows: "After the expiration of two years and nine months after the date of the sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person who is in possession of such land, and also upon the person in whose name the same is taxed, if such person reside in the county where the land is situated, in the manner provided by

law for the service of original notices, a notice signed by him, his agent or attorney, stating the date of sale, * * * and that the right of redemption will expire, and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. Service may be made upon non-residents of the county by publishing the same three times in some newspaper printed in the county. * * * Service shall be deemed complete when an affidavit of the service of said notice, and of the particular mode thereof, duly signed, and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer authorized to execute the tax deed. Such affidavit shall be filed by said treasurer, and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice herein required, and until ninety days after the service of said notice the right of redemption from such sale shall not expire. * * *” Section 895 provides that “immediately after the expiration of ninety days from the date of service of the written notice herein provided, the treasurer then in office shall make out a deed for each lot or parcel of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase.”

There is no express provision in section 894 as to the person or officer by whom the service may be made, and plaintiff contends that, as the notice is required to be served (when the party to be served is a resident of the county) in the manner provided by law for the service of original notices, the various provisions of the statute which prescribe the mode of service of original notices, the officer or persons who are competent to serve them, and the manner of proving the return, are applicable to the service and return of such notices, and hence that the return of the sheriff was competent evidence of the manner of the service of the notice in question; and as it had been served in the manner prescribed by

the statute, the treasurer was authorized to execute the deed. We are of the opinion, however, that this is not the proper construction of the statute. The provision in question was intended to prescribe only the *mode* in which the service should be made. It is provided by section 2603 that an original notice may be served (1) by reading and delivering a copy of it to the defendant; (2) by leaving a copy with a member of his family at his usual place of residence, when he is not found in the county of his residence; or (3) by taking an acknowledgment of the service indorsed on the notice, dated, and signed by the defendant. The provision that the notice shall be served in the manner prescribed for the service of original notices means simply that it shall be served by one of these modes; and it prescribes no rule as to the person or officer who shall make the service, or as to the return.

But these are matters which are governed by subsequent provisions of the section. It is provided that "service shall be deemed completed when an affidavit of the service of such notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer," and this affidavit is made presumptive evidence of the service of the notice, and it is the only evidence of that fact which is required to be filed or preserved. It is not contemplated that any other return of the service shall be made, and as it is required to be made by the holder of the certificate, his agent or attorney, it is equally clear that the service can be made only by such holder, his agent or attorney. When the treasurer executed the deed in question, then, he had no competent evidence on file in his office that the notice had been served, and in the absence of such evidence we think he had no authority to execute the deed. The affidavit is not only the only competent evidence of the fact and manner of the service, but the service is not deemed complete until it is filed with the treasurer. The period allowed the owner of the

Maxon v. The Chicago, Milwaukee & St. Paul R'y Co.

land after service of the notice, within which to redeem it from the sale, does not begin to run until the affidavit is filed.

We think, therefore, that the district court rightly held that defendant's right to redeem the land had not expired.

AFFIRMED.

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132 104

MAXON V. THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.

1. **Change of Venue: ON MOTION TO CORRECT RECORD: CHANGE NOT ALLOWED.** After the cause was tried in the circuit court and an appeal taken, a motion was made in that court by appellee to correct the record, which was alleged to have been falsified. Pending this motion, appellant moved for a change of the place of trial, on the ground of the prejudice of the circuit judge. *Held* that the motion for a change was properly overruled, because the cause was not pending in the circuit court for trial, but only for a correction of the record, and there is no provision of the statute authorizing a change of the place of trial in such a case.
2. **Appeal to Supreme Court: JURISDICTION OF TRIAL COURT TO CORRECT RECORD.** After an appeal to the supreme court, the trial court still has jurisdiction to correct its own records in the case. *Mahaffy v. Mahaffy*, 63 Iowa, 55, followed.
3. **Practice in Supreme Court: CONFLICTING EVIDENCE TO SUPPORT VERDICT.** This court will not interfere with the finding of a jury when there is a conflict in the evidence.
4. **—: INSTRUCTIONS NOT DULY EXCEPTED TO NOT REVIEWED.** This court will not review rulings upon instructions which were not excepted to either at the trial, or within three days after the verdict. Code, § 2789.

Appeal from Clinton Circuit Court.

THURSDAY, OCTOBER 22.

PLAINTIFF brought this action to recover damages on account of the killing by defendant on its railroad track of one horse, and the injury of another. There was a verdict and judgment for plaintiff in the circuit court, from which

Maxon v. The Chicago, Milwaukee & St. Paul R'y Co.

defendant took an appeal. After the appeal was perfected, plaintiff filed a motion in the circuit court to correct the record in the cause by returning to the files the original exceptions to the instructions of the court to the jury, and striking from the files a pretended motion for a new trial, which was then on the files, and substituting therefor the real motion which was filed in the case by defendant. The circuit court sustained this motion, and made the order prayed for therein, and from this order defendant also appealed. Both appeals will be disposed of in one opinion.

N. Corning and *A. T. Wheeler*, for appellant.

W. C. Grohe, *A. R. McCoy* and *A. Howat*, for appellee.

REED, J.—We will first consider the questions presented under the appeal from the order correcting the record. When this motion was filed there was among the files in the case a paper which purported to be a motion by defendant for a new trial. This paper appeared, by the note of filing indorsed on it by the clerk, to have been filed within three days after the verdict was returned, and in it exceptions are alleged to certain of the instructions given by the court to the jury on the trial of the cause. It also contained a recital that the defendant had excepted on the trial to the refusal of the court to give certain instructions asked by it. The ground of the motion to correct the record is that the exceptions to the instructions given by the court were not alleged in the motion for a new trial when it was placed upon file, and that it did not then contain the recital that defendant had excepted to the refusal of the court to give the instructions asked by defendant. It is also alleged in the motion that a paper which was designated an assignment of errors, and which had been filed in the cause, had been withdrawn from the files without leave of the court. On the hearing of the motion the circuit court found that the motion for a new

Maxon v. The Chicago, Milwaukee & St. Paul R'y Co.

trial had been changed after it was filed, in the respects alleged; also that the paper designated an assignment of errors had been removed from the files; and it ordered that the paper purporting to be a motion for a new trial then on the files be stricken therefrom, and that a copy of the motion as originally filed be substituted for it on the files; and that the paper which had been withdrawn from the files without leave be returned thereto.

I. After the motion to correct the record was filed, defendant filed a motion, supported by affidavit, for a change

of the place of trial, on the alleged ground that the judge of the circuit court was so prejudiced against it that it could not obtain a fair trial before him. The overruling of this motion is assigned as error. We deem it a sufficient answer to the argument of counsel on this question to say that the law makes no provision for a change of place of trial in such a proceeding. The cause was not pending in the court for trial. It had already been tried and disposed of, and the proceeding was to correct the records of the court in certain respects wherein it was alleged they had been falsified. The proceeding was entirely distinct from the trial of the cause, and none of the provisions of the statute for removing causes into other courts for trial have any application to it. As bearing on the question, see *Gilman v. Donovan*, 59 Iowa, 76; *Perkins & Jones*, 55 Id., 211.

1. CHANGE of venue: on motion to correct record: change not allowed.

II. Defendant filed a motion to strike the motion to correct the record from the files, on the ground that, as an

2. APPEAL to supreme court: jurisdiction: of trial court to correct record.

appeal had been taken, the court had no jurisdiction of the cause or the parties. The overruling of this motion is assigned as error. It is probably true that by the appeal the court lost jurisdiction of the subject-matter of the controversy, and that it had no power thereafter, until the cause should be remanded, to make any order affecting the rights of the parties with reference to the subject-matter. This is expressly

Maxon v. The Chicago, Milwaukee & St. Paul R'y Co.

held in *Levi v. Karrick*, 15 Iowa, 444. But the appeal did not deprive it of the power to correct its own records. It has jurisdiction to do that at any time. The question was directly involved in *Mahaffy v. Mahaffy*, 63 Iowa, 55, and the ruling there made is adverse to defendant's position.

III. It is finally insisted that the circuit court was not justified by the evidence in making the order for the correction of the record. There is great conflict in the evidence, and it is quite voluminous. We do not deem it important to set it out in the opinion. It is sufficient to say that in our opinion it fully sustains the finding and order of the circuit court.

IV. We come now to the questions sought to be raised under the appeal from the judgment. It is first insisted that the verdict is not supported by the evidence.

3. PRACTICE
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port verdict.

We have very thoroughly examined the evidence, which is fully set out in the abstract, and we have to say that, while a different result might have been reached from it, it cannot be said that the verdict finds no support in the evidence, but, on the contrary, there is a conflict in the evidence as to all the material questions in the case. It is now so well understood by the profession that this court will not interfere with the finding of the jury when there was a conflict in the evidence that it is unnecessary to cite the numerous cases in which that holding has been made.

V. The only other questions argued by counsel for appellant relate to the correctness of the instructions given by the

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court, and the action of the court in refusing those asked by defendant. But under the present state of the record we cannot consider these questions. It appears by the record, as amended by the circuit court, that no exceptions were taken by the defendant at the trial, either to the instructions given or to the refusal to give those asked by it. Nor were any such exceptions filed within three days after the verdict. Under these circumstances, the rulings of the circuit court cannot be

The State v. Winebrenner et al.

reviewed by this court. Code, § 2789. *Bailey v. Anderson*, 61 Iowa, 749.

The order and judgment appealed from will be

AFFIRMED.

THE STATE V. WINEBRENNER.

SAME V. McMAHON.

SAME V. BEECHER.

SAME V. RUBURG.

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87	727
67	230
894	69
67	230
126	78

1. **Grand Jury: WHEN TERM OF SERVICE EXPIRES.** Grand jurors are selected for the first term of the district court in the year at which jurors are required, commencing next after the first day of January in each year, and they serve for one year, or until the corresponding term of the succeeding year. Code, §§ 234, 239. Consequently, where a term of the district court began on the eighth day of December, 1884, and continued into January, 1885, the grand jury impaneled in 1884 was competent to find an indictment during the term in January, 1885. *State v. Delong*, 12 Iowa, 453, decided under a different statute, distinguished.
2. **Criminal Law: INTOXICATING LIQUORS: NUISANCE: INDICTMENT: DUPLICITY.** An indictment for nuisance in keeping a place for the unlawful sale of intoxicating liquors considered, (see opinion.) and held not bad for duplicity. *State v. Dean*, 44 Iowa, 648, followed.

Appeals from Marshall District Court.

THURSDAY, OCTOBER 22.

INDICTMENTS charging the defendants as follows: "The grand jury of the county of Marshall, in the name and by the authority of the state of Iowa, accuse John C. Winebrenner of the crime of nuisance, committed as follows: The said John C. Winebrenner, on the fourth day of July, 1884, and on divers other days prior to the finding of this indictment, and since said day, in a building owned by Albert

Sharp, on the south one hundred feet of the east one-third of lot 7 and block 9, in the town of Marshall, in the county aforesaid, wrongfully and unlawfully did erect, continue and use a certain building and place commonly known as a 'saloon,' in which said building and place the said John C. Winebrenner did keep intoxicating liquors, to-wit, whisky, rum, gin, brandy, ale, beer, wine, alcohol, bitters and mixed drinks, with intent then and there to sell the same in said building and place in violation of law; and at said time and place, and in said building, the said defendant did habitually and repeatedly keep and sell, in the state of Iowa, beer and other intoxicating liquors contrary to law; and at said time and place, and in said building, the said defendant did allow and permit gambling, fighting, drunkenness and other breaches of the peace, and the same were then and there carried on by and with the consent of the defendant, to the disturbance of others; and said defendant, in said building and place, at said time, did habitually and repeatedly sell ale, beer, wine and intoxicating liquors to minors and intoxicated persons, and to those in the habit of becoming intoxicated, to the disturbance of others and contrary to law." The defendants severally pleaded guilty, and filed a motion in arrest of judgment, which was overruled and, judgment being rendered, they severally appeal.

Parker & Childs, for appellants.

A. J. Baker, Attorney-general, for the State.

SKEEVERS, J.—I. The record in the foregoing cases and the questions to be determined are precisely the same, and therefore but a single opinion is required. The first ground in the motion in arrest of judgment is that the indictment was found on the seventh day of January, 1885, by a grand jury drawn, selected, and summoned for the year 1884. The term of court at which the indictment was found commenced on the eighth day of

1. GRAND
jury : when
term of serv-
ice expires.

The State v. Winebrenner et al.

December, 1884, and, as the record fails to show anything to the contrary, it must be assumed that the term continued until the finding of the indictment. The statute provides that a list consisting of seventy-five persons shall annually be made, from which to select grand jurors for the year, commencing on the first day of January. The grand jurors shall be selected for the first term in the year at which jurors are required, commencing next after the first day of January in each year, and shall serve for one year. Code, §§ 234, 239.

The grand jury in the case at bar, when impaneled, was a legally constituted body. Now, does it cease to be such before the adjournment of the term? If so, there must be a statute which in terms so declares, because in contemplation of law the whole term is considered as but one day. 2 Bouv., Law Dict., 787. The statute in terms provides that the grand jurors shall be selected for the first term in the year at which jurors are required, commencing next after the first day of January in each year. The jurors so selected cannot act as such until that time or term. They serve for one year, or until the corresponding term in the succeeding year. Owing to a change in the statute, *State v. Delong*, 12 Iowa, 453, is no longer applicable.

II. The next ground urged in arrest of judgment is that two offenses are charged therein. The indictment is substantially the same as in *State v. Dean*, 44 Iowa, 648, and, following that case, we hold that the indictment in this case is not bad for duplicity.

2. CRIMINAL
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AFFIRMED.

DEAN V. SCOTT ET AL.

1. **Vendor's Lien: ACTION TO ENFORCE: FACTS NOT ENTITLING TO RELIEF.** Action to enforce a vendor's lien against a purchaser from the vendee. But it appearing that the lien was not preserved by any recorded instrument, and that there was no fraud or collusion between the vendees, *held* that the lien could not be recognized or enforced. Code, § 1940.

Appeal from Poweshiek Circuit Court.

THURSDAY, OCTOBER 22.

ACTION in equity to foreclose a mortgage upon certain land, and also to foreclose a vendor's lien upon the same and other land. The court decreed a foreclosure of the mortgage, but refused to decree a foreclosure of the alleged vendor's lien, and dismissed the plaintiff's petition in respect to such lien. The plaintiff appeals.

Robinson & Patterson, for appellant.

John T. Scott, for appellee.

ADAMS, J.—The plaintiff's mortgage was acquired by purchase from the Connecticut General Life Insurance Company. Her alleged vendor's lien was acquired from the administrators of the estate of one E. T. Seymore, deceased. Seymore, in his life-time, owned four quarter sections of land in Poweshiek county. One of them he mortgaged to the Connecticut General Life Insurance Company. After his death his administrators sold and conveyed the four quarter sections to the defendant George W. Scott, who assumed as part of the purchase money the payment of the mortgaged debt due the life insurance company. After this conveyance, Scott sold and conveyed the premises by quitclaim deed to the defendant Buswell. The plaintiff claims that the purchase money due from

Scott primarily to the administrators became payable under the agreement, to the amount of the mortgage debt, to the life insurance company, and that the administrators had a vendor's lien for that amount upon the four quarter sections sold and conveyed to Scott, and she claims that she is entitled, as assignee of the lien to enforce it, even as against Buswell, Scott's grantee.

Buswell's position is that such lien, if it ever existed, was extinguished when the land was conveyed to him. He relies upon section 1940 of the Code, which is in these words: "No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity, after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor or assigns, to enforce the lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyances procured through fraud or collusion of vendees therein, or persons purchasing of such vendees with notice of such fraud."

The plaintiff endeavors to meet Buswell's position by saying that the administrators' vendor's lien was preserved in the deed by them to Scott, and moreover that the sale and conveyance by Scott to Buswell was made by fraud and collusion between them to hinder and delay the administrators in the collection of the debt.

In respect to the question as to whether a vendor's lien was reserved in the deed by the administrators to Scott, we have to say that we do not think it was. We find no allusion to such lien. It is, to be sure, provided that Scott assumes the payment of the mortgage debt resting upon a part of the land. But this only shows the mode in which he was to pay a part of the purchase money. This is something quite distinct from a vendor's lien.

As to whether there was fraud on the part of Buswell we have to say that we think that this question also must be

Applegate v. Winebrenner et al.

answered against the plaintiff. We have all reached this conclusion upon a separate reading of the evidence, and must be allowed to merely state our conclusion without setting out the evidence upon which the plaintiff relies.

In our opinion the decree of the circuit is correct.

AFFIRMED.

APPLEGATE V. WINEBRENNER ET AL.

1. **Intoxicating Liquors: WRONGFUL SALE TO HUSBAND: ACTION BY WIFE FOR DAMAGES: EVIDENCE.** Plaintiff's action was based upon the wrongful sale to her husband of intoxicating liquors during six months previous to the action, whereby she was injured in her person, property and means of support. *Held* that evidence of personal injuries inflicted upon her by her husband, as the result of his intoxication, more than six months prior to the beginning of the action was irrelevant to the issue.
2. ———: ———: ———: ———: **INDICTMENTS AGAINST ONE DEFENDANT.** In such action, where the owner of the saloon property was joined as defendant for the purpose of making the judgment to be obtained a lien on the property, *held* that former indictments against the principal defendant for the unlawful sales of intoxicating liquors, not shown, however, to have been made to plaintiff's husband, were not competent as evidence for the purpose of charging the owner of the property with knowledge of the wrongful sales in the premises.

Appeal from Marshall Circuit Court.

THURSDAY, OCTOBER 22.

THE plaintiff is the wife of Philip Applegate, and she alleges in her petition that the defendant Winebrenner is the keeper of a saloon, in which he sells intoxicating liquors, and that, at various times within six months next before the commencement of the suit, said Winebrenner wrongfully and illegally sold to plaintiff's said husband, at said saloon, intoxicating liquors when he was sober, causing his intoxication; and sold intoxicating liquors to him when he was drunk, and

thereby contributed to his drunkenness; and that plaintiff has thereby been injured in her person, property and means of support.

She further averred that the defendant Sharp is the owner of the building and ground where said saloon was kept, and that he had notice of the wrongs complained of, and notice that Winebrenner was selling intoxicating liquors at said saloon in violation of law. Judgment was demanded against Winebrenner, and it was prayed that such judgment be made a lien upon the saloon property. The answer of the defendants' was a general denial. There was a trial by jury, which resulted in a verdict for the plaintiff, and a finding that the defendant Sharp knew and consented to the sales complained of. A judgment was entered upon the verdict, and the same was established as a lien upon the property of Sharp. Defendants appeal.

Parker & Childs, for appellants.

Caswell & Meeker, for appellee.

ROTHROCK, J.—I. The appellee filed an additional abstract, the correctness of which is denied by the appellants. This would ordinarily compel us to resort to the transcript to settle the conflict in the abstracts. This course is not necessary, however, in this case. There is enough in the record as made by the abstracts, and about which there is no dispute, to dispose of the appeal. The action was commenced in September, 1884, and the plaintiff alleged that Winebrenner sold her husband intoxicating liquors for a period of six months previous thereto, and that the liquors so sold caused or contributed to his intoxication. The plaintiff was examined as a witness in her own behalf, and she was permitted to testify, against the plaintiff's objection, that in September, 1883, her husband went to Marshalltown, and came home at 4 o'clock

1. INTOXICATING liquors: wrongful sale to husband: action by wife for damages: evidence.

in the morning, and unjustly accused her of wrongful acts, and, while eating breakfast, a dispute arose, and he assaulted her, took her by the arms, choked her, threw her down and kicked her, so that she was "black and blue" as large as her hand for nearly two weeks. The witness did not state that her husband was intoxicated when he committed this outrageous assault upon her. A witness who was present when the assault was made corroborated the plaintiff as to the assault, and stated that Applegate, her husband, "had just been on a drunk, and was nervous and cross."

This evidence was probably sufficient to justify the jury in finding that the personal abuse of the plaintiff was fairly attributable to the intoxication of her husband, and, if proper evidence in the case, it would add very materially to the plaintiff's damages. But we are very clearly of the opinion that the evidence was improper. If the assault was the result of intoxication, there is no evidence whatever that the intoxication was produced or contributed to by liquors obtained at the defendant's saloon. Another reason why the evidence should have been excluded is that the assault was committed long before the defendant wrongfully sold liquors to the plaintiff's husband, as shown by the allegations of her petition.

II. The plaintiff was permitted to introduce in evidence, over defendant's objection, certain indictments against the
 2. —: —: defendant Winebrenner, and the record of convictions thereon. This was manifestly erroneous.
 indictments against one defendant. It was not even shown in connection with this evidence that the indictments were founded upon unlawful sales made to plaintiff's husband. We do not understand that counsel for appellee claim that this was competent evidence against Winebrenner, but they claim that the court allowed the evidence to go to the jury as tending to show that the defendant Sharp had notice that Winebrenner was using Sharp's property as a place for unlawfully selling liquor. We cannot see upon what principle the evidence in

question can be held as competent as to one defendant and not as to the other.

III. There are many other errors assigned and argued. As the case must be reversed for those above discussed, and as the record is in such condition that a resort to the transcript would be necessary to determine some of the questions made, we will go no further in the case. It is proper to observe that we think the court was correct in refusing to submit to the jury some of the special interrogatories asked to be submitted by the defendants. Others of them presented questions pertinent to the case, and were not objectionable in form, and ought to have been submitted.

REVERSED.

CLAYTON V. THE CHICAGO, IOWA & DAKOTA R'Y CO.

1. **Railroads: CONDEMNATION OF RIGHT OF WAY: APPEAL: VIEW BY JURY: DISCRETION OF COURT.** Section 2790 of the Code leaves it to the discretion of the trial court whether or not the jury shall view the premises in controversy, and this court cannot interfere with the exercise of such discretion. So held in this case,—an appeal from an award by commissioners of damages for right of way for a railroad.
2. ———: **RIGHT OF WAY: INSTRUCTION: EASEMENT.** While the right of way for a railroad condemned under the statute is an easement, and the fee remains in the owner of the land condemned, yet it is not proper so to instruct a jury in an appeal from condemnation proceedings, unless it is made to appear that the fee, burdened with the easement, is of some determinative value to the owner, which is not ordinarily the case. *Cummings v. Des Moines & St. Louis R'y Co.*, 63 Iowa, 397; and *Hollingsworth v. Same*, Id., 443, followed.
3. ———: ———: **RIGHT OF OWNER TO CROSS: INSTRUCTION.** An instruction which assumes that the owner of land condemned for right of way for a railroad has a right to cross and recross it, superior to the right of the company to use it for railway purposes, is erroneous, and was properly refused in this case.

 Clayton v. The Chicago, Iowa & Dakota R'y Co.

Appeal from Hardin Circuit Court.

THURSDAY, OCTOBER 22.

THE defendant's railroad is located over a part of the plaintiff's farm. The parties were unable to agree upon the compensation to be paid to the plaintiff for the right of way. Commissioners were selected by the sheriff to assess the damages, and they fixed the amount at the sum of \$500. The plaintiff appealed from this assessment, and a trial by jury was had in the circuit court. The jury fixed the compensation at \$1,000, and the defendant appeals.

John Porter and *C. E. Albrook*, for appellant.

S. M. Weaver and *B. P. Birdsall*, for appellee.

ROTHROCK, J.—After the evidence was introduced, the defendant requested the court to order the jury to be taken to the farm and make a personal inspection and examination of the premises. This request was denied. The statute (Code, § 2790) provides that "whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of the controversy, * * * it may order them to be conducted in a body, under the charge of an officer, to the place," etc., that such view may be had. This provision of the law is merely directory, or rather it gives the court the option or discretion to send the jury to the place in controversy to view the premises. We cannot interfere with this discretion. It would be an exceedingly difficult matter to show that the court abused its discretion in refusing to make an order of this kind. It appears that in this case a map was used upon the trial, showing the farm and the right of way through it, and the witnesses described fully the situation of the premises, and we suppose the court was

1. RAILROADS:
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of way: ap-
peal: view by
jury: discre-
tion of court.

 Clayton v. The Chicago, Iowa & Dakota R'y Co.

correct in holding that a view of the farm was not necessary to enable the jury to understand and properly apply the evidence in this case, and reach a just determination of the rights of the parties.

II. The defendant requested the court to charge the jury as follows: "The defendant railway company, in the case at bar, by proceedings in condemnation, acquires only an easement, as it is sometimes called; or, in other words, the right only to *use* the lands taken for the purpose of constructing and operating its line of railroad, but at the same time leaves the plaintiff or the owner of the premises the right to cross and recross the line at pleasure for the purpose of going from one part to any other part of his premises, and requires the railroad company, when demanded so to do by the owner, to construct and maintain one or more crossings over or under or at grade, upon the premises or farm in question, so as reasonably to accommodate such owner." The defendant complains because the court refused to give this instruction to the jury.

That a railroad right of way is an easement, and that the fee remains in the owner of the land condemned for railway purposes, are correct as abstract propositions of law; but they have no application in proceedings to condemn land for right of way for a railroad, except when it is made to appear that the fee burdened with the easement is of some determinative value. The theory is that the easement is to be a perpetual right, and it is the usual practice to introduce evidence in these cases, showing the full value of the land actually taken, as an item in the estimate of the damages sustained by the property owner. This is allowed upon the theory that any interest he has in the land actually appropriated is of no value. This court has held that it is not error to refuse to instruct the jury in such cases that the fee title remains in the owner. *Cummins v. Des Moines & St. Louis R'y Co.*, 63 Iowa, 397; *Hollingsworth v. Same*, Id., 443. And the jury are not warranted in estimating the compensation to

 White v. Jones.

the owner upon the theory that at some time in the future the land appropriated for the right of way may cease to be used for railway purposes and revert to the owner.

We further believe that the court correctly refused the instruction, because it impliedly, at least, assumes that the owner has a right to cross and recross the right of way, superior to the right of the defendant to use it for the purposes of operating a railroad upon it. The owner is not invested with the right to cross the line at pleasure. Whatever right he has in that respect is subservient to the right of the railroad company to use the road in running its trains. It appears to us that the instruction was properly refused.

III. It is claimed that the compensation awarded by the jury is excessive. We think otherwise. The verdict appears to be fairly sustained by the evidence.

AFFIRMED.

WHITE. v. JONES.

1. **Contract: FOR BOARD OF PRISONERS HELD BY CONSTABLE: PARTIES BOUND BY.** Defendant, as constable, had certain prisoners in his custody for preliminary examination before a magistrate, and he procured board and lodging for them of plaintiff upon the statement, made by defendant at the time, that he would not be responsible to plaintiff for the board and lodging, but that he (plaintiff) must look to the county for compensation. *Held* that, whether or not in any case the county would be liable for board and lodging furnished to prisoners so held, the defendant was not liable for the board and lodging furnished by plaintiff under the circumstances named.

Appeal from Dallas Circuit Court.

THURSDAY, OCTOBER 22.

ACTION upon an account. The action was brought to recover for boarding certain persons held in custody by the

White v. Jones.

defendant as constable of Linn township, Dallas county. The petition averred what was the reasonable worth of the board, and also that the defendant agreed to pay for the same. The defendant, for answer, averred that the persons boarded were held by him as constable for preliminary examination. He denied that he promised to pay for the board of the prisoners, or in any way held himself out as responsible; but, on the other hand, expressly told the plaintiff that he must look to Dallas county for his pay, which was responsible. He also pleaded that the promise, if made as averred, would be a promise to pay the debt of another, to-wit, the debt of Dallas county, and so would be within the statute of frauds. The plaintiff demurred to the answer, and the demurrer was overruled; and, the plaintiff electing to stand upon his demurrer, judgment was rendered against him for costs. He appeals.

H. E. Long, for appellant.

C. W. Hill, for appellee.

ADAMS, J.—This case involves less than \$100, and comes to us upon a certificate. Five questions are certified, but it will be sufficient to determine the first one. That one is in these words: "Where a constable has in his custody prisoners under warrant of arrest, and holding them for preliminary examination before a magistrate, and while holding said prisoners in his charge said constable has them boarded and lodged by a hotel-keeper, is the constable liable to said hotel-keeper for the board and lodging of said prisoners?" This question, if it arose at all, arose upon the overruling of the plaintiff's demurrer to the defendant's answer. The demurrer admitted the allegations of the answer. The question, then, should have contained the qualification that the constable expressly refused to become responsible, and told the plaintiff that he must look to Dallas county. In considering the question we shall consider it as if it contained this qualifica-

tion. Now, if the defendant so told the plaintiff, it cannot, of course, properly be claimed that there was any express contract on the part of the defendant to pay the plaintiff, and we do not understand the plaintiff as contending that it can be. His contention, as we understand, is that it was the defendant's duty to have the prisoners boarded, and pay for the board himself, without reimbursement; and, such being his duty, it was not his right to say that he would not be responsible, and therefore what he said in that respect did not prevent an implied contract from arising when the board was furnished.

Whether if the defendant had paid for this board he might not have recovered from Dallas county as expenses incurred in the exercise of his office under the rule laid down in *Brin-golf v. Polk Co.*, 41 Iowa, 554, we need not determine, as we do not have such a case. Whether the county is not free from liability to any one, from want of a statute imposing a liability of that kind, we need not determine. If we should concede that the county is not chargeable under any circumstances, we do not think it would follow that the defendant is chargeable under the circumstances of this case. It was the defendant's right, in proposing to employ the plaintiff, to impose his own conditions, and it was equally the plaintiff's right to refuse to be employed upon those conditions. While it was perhaps necessary that some one should board the prisoners, there was no specific obligation resting upon the plaintiff to do it. We think, therefore, that when he undertook to board the prisoners he must be held to have done so upon the terms which the defendant prescribed. It matters not that the county's liability was doubtful, or was not believed to exist, or does not in fact exist, if such is the law. It was the defendant's right to procure the prisoners boarded by some one, if he could, who would agree to look to the county alone, and it is not for us to say that if the plaintiff had refused to board them upon those terms the defendant could not have found some one who would.

The Trustees of Iowa College v. Fenno et al.

We think, then, that, taking the allegations of the answer to be true, the tacit if not the express understanding was that the plaintiff would not look to the defendant, but the county; and with this view the answer showed a good defense, and the demurrer to it was properly overruled.

AFFIRMED.

THE TRUSTEES OF IOWA COLLEGE V. FENNO ET AL.

1. **Mortgages: PARTS OF SAME TRANSACTION: CONSTRUCTION AS TO QUESTION OF PRIORITY.** Two mortgages made by the same persons, on the same land, as parts of the same transaction, but dated on two consecutive days, and each referring to the other, construed, (see opinion,) and the question of priority determined.

Appeal from Poweshiek District Court.

THURSDAY, OCTOBER 22.

ACTION to foreclose a mortgage executed to the plaintiffs by the defendants Miriam Fenno and Charles C. Fenno.

The plaintiffs made S. S. Preston defendant, who holds a mortgage upon the same property, executed to him by the Fennos, but they aver that his mortgage is junior to theirs and subject to it. Preston for answer denies that his mortgage is junior to the plaintiffs' and subject to it. By way of cross-petition he seeks a foreclosure of his mortgage, and avers that the plaintiffs' mortgage is subject to it. The Fennos made no defense to either mortgage. The court granted a foreclosure of both mortgages, and decreed that Preston's mortgage was paramount to the plaintiffs, so far as the principal of his debt was concerned. The plaintiffs appeal.

. *Haines, Lyman & Howell*, for appellants.

L. C. Blanchard, for appellee.

ADAMS, J.—The principal question presented in this case is as to priority, and that is to be determined by a construction of the two mortgages. The plaintiffs' mortgage purports to have been executed on the thirty-first day of March, 1881. Preston's mortgage purports to have been executed on the first day of April, 1881. Preston avers that they were in fact executed upon the same day. The question as to whether they were or not is not very material. Preston's mortgage was recorded first, but that fact is not material. Each refers to the other. The mortgagee in each had notice of the other, and the mortgages may be considered as in some sense parts of the same transaction. The plaintiffs aver that the mortgage to them was given to secure money loaned to the Fennos to pay off a mortgage debt already existing as a first lien. This is not admitted by Preston, and is not, we think, proven. We refer to it only as a possibility which, regarded merely as such, may aid in the construction of the mortgages. That Preston had previously had a mortgage upon this property, given to secure the same debt, we understand to be admitted. That he released that mortgage, and took instead thereof the mortgage which he is seeking to foreclose, and that the release was a part of the transaction in which the plaintiffs mortgage was executed, we understand also to be admitted.

As each mortgage refers to the other, and they were in some sense, as the parties seem to concede, parts of the same transaction, it becomes important not only to carefully examine their provisions, but to compare them with each other. The plaintiffs' mortgage, as has been stated, was dated one day earlier than Preston's. He avers that this was by mistake, but we see no evidence that it was, and think it more probable that it was done by design and without reference to the true date. The plaintiffs' mortgage contains a covenant that the premises are free from incumbrance. Preston's mortgage provides that it is "subject to a mortgage of \$8,750 to the trustees of Iowa College," which was the amount of the

plaintiffs' mortgage, and Preston's mortgage contains a covenant that the premises "are free from incumbrance except as above stated," the exception referring to the plaintiffs' mortgage. Preston's mortgage refers to the plaintiffs's debt as the first mortgage debt. The reference is contained in a provision for foreclosure, and is in these words: "The said parties [the Fennos] further agree that if they fail to pay any of the said money, or the first mortgage debt, principal or interest, within thirty days after the same becomes due, this mortgage may thereupon be foreclosed immediately for the whole of said money, interest and costs."

If this were all, there could be no question about the priority of the plaintiffs' mortgage. The parties could not well have used more explicit language for the purpose of showing such priority. The doubt, if any, arises from a provision which is nearly the same in each mortgage, providing for the application of the proceeds of sales. In Preston's mortgage it is in these words: "It is further expressly agreed that from and after April 1, 1881, the first mortgagees, the trustees of Iowa College, shall have immediate and sole possession and exclusive control of said property during their mortgage debt, and shall rent or sell the same as they may see fit, and said first parties hereby agreeing to sign all necessary papers to that end; that in leasing or selling said property, or parts thereof, L. E. Spencer, Esq., of Grinnell, Iowa, shall act as agent of all parties herein named, and shall receive fifty dollars per year as compensation for such services out of the proceeds of all leases and sales,—said proceeds to be controlled by said first mortgagees and be applied on the interest of the first mortgage debt; next on the taxes due or to become due on said land; next on any and all expenses to which said first mortgagees may have been put in the management and keeping up of said property, including compensation to agents; and any balance remaining after said interest, taxes and expenses are paid shall be then applied, first, on the note to said S. S. Preston, secured by this mortgage,

until the same be paid, both principal and interest, and, when so paid, then to be applied on the principal note to the said first mortgagees."

In determining the rights of these parties, it is our duty to adopt such construction of the mortgages as shall be consistent with every part, if it can be done; and we have to say that we think it can. We have only to refer the words "said proceeds," as used in the mortgages, to the proceeds of such leases and sales as should be made by Spencer. This accords strictly with the grammatical construction, which may always be allowed a large influence, and usually a controlling one. The word "said" is a word of limitation. It is used expressly by way of reference to the word "proceeds" used in the preceding line, and its office unquestionably is to denote that the word "proceeds," which is limited by it, means the same as the previous word "proceeds," which is referred to by it. If the parties intended by the word "proceeds," as last used, something more than they intended by the word as first used,—that is, if they intended by the word as last used to include not only the proceeds of Spencer's sales, but the proceeds of sales made upon execution in pursuance of a decree of foreclosure,—the word "said" should have been omitted. In no other way could the word "proceeds" be used in a general way, and properly bear the meaning which Preston contends for.

It is said, to be sure, that the word "proceeds" as first used has a meaning broad enough to include proceeds of sale upon execution; but we think otherwise. No other sales had been alluded to except such as should be made by Spencer. Besides, there is another consideration which remains to be mentioned, which, we think, removes all doubt upon this point, if there would otherwise be any. The provision is that "said proceeds are to be controlled by said first mortgagees and be applied," etc. Now, not a dollar of the proceeds of sales upon execution could properly be controlled by the first mortgagees, so far as the matter of distribution is concerned, and

it would be senseless to suppose that the parties had the distribution of the proceeds of such sales in mind. The law provides for the control and distribution of proceed of sales upon execution. It was only the control and distribution of the proceeds of private sales that the parties needed to provide for.

What the object of the parties was, under the construction which we adopt, we think can be very easily understood. Preston and the mortgagors had consented that these plaintiffs, denominated first mortgagees, should have absolute power to sell through their agent, Spencer, at private sale, as they should see fit. Now, such power could not properly be given by Preston to these plaintiffs, if his right of payment was to be wholly postponed to theirs. He would be utterly without protection. The mortgagors, too, needed some safe-guard against the first mortgagees' frittering away the security by private sales made only with the view of getting their own money out. Looking, then, only at this part of the mortgage, upon which Preston solely relies, we have to say that we do not think it susceptible of the construction for which he contends. But, when we come to look at other parts of the mortgage, his position is manifestly untenable. His mortgage provides that it is "subject to a mortgage of \$8,750 to the trustees of Iowa College." He contends that it is not, and he asks this court to so hold directly in contravention of this provision. It is no answer for him to say that he concedes that his mortgage is subject to the *interest* on the plaintiffs' mortgage. It would be trifling with the English language to say that that is the fair or even possible meaning of the provision. Again, the plaintiffs' mortgage (executed, as Preston says, at the time his mortgage was, and as a part of the transaction) contains a covenant that the premises are free from incumbrance. His mortgage refers to theirs, and was drawn consistently with this covenant. He asks us now to hold that at the time this covenant was made the premises were not free from incumbrance, but were subject to the incum-

brance of his mortgage, so far as the principal debt is concerned, though his mortgage expressly provided otherwise and was dated one day later.

We have already seen that Preston had, prior to this transaction, a mortgage upon the property, and released it and took the mortgage now sought to be enforced by him to secure the same indebtedness. The fact that this mortgage was executed as a part of the same transaction in which the plaintiffs' mortgage was executed, and the fact that the two mortgages are dove-tailed together in the manner in which they are, give support to the supposition that Preston was benefited in some way by the loan made by the plaintiffs, either because the money was used to discharge an incumbrance prior to his former mortgage, or for some other reason. But it is not important to indulge in suppositions. It is sufficient that, under the construction which we adopt, the parties may have had abundant reason for drawing the mortgages as they did. It is impossible to adopt the construction which Preston contends for, and give any reason why the mortgages were so drawn. We think that the plaintiffs are, for all intents and purposes, first mortgagees, just as they are denominated in Preston's mortgage, except as otherwise expressly provided in the matter of the proceeds of sales made by the plaintiffs themselves through their agent Spencer.

So no other questions are discussed, but the view which we have taken disposes of this case.

MODIFIED AND AFFIRMED.

67 250
J104 54067 250
119 626THE IOWA UNION TELEPHONE CO. v. THE BOARD OF
EQUALIZATION OF THE CITY OF OSKALOOSA.

1. **Taxation: TELEPHONE PROPERTY: HOW ASSESSED.** The lines and property of telephone companies are to be assessed in the manner provided for the assessment of telegraph lines and property; that is, by the state board of equalization; (Chap. 59, Laws of 1878;) and the board of equalization of a city has no power to assess the same.

Appeal from Mahaska Circuit Court.

THURSDAY, OCTOBER 22.

THE plaintiff is a corporation operating telephone lines, its principal place of business being in the city of Davenport. It does business, however, in the city of Oskaloosa, from which different lines radiate, and it has what is called a central office in that city, by which is meant the central office of a district, denominated an exchange. The board of equalization of the city of Oskaloosa assessed the property of the company at \$2,000. From that assessment the company appealed to the circuit court, and the court reduced the assessment and fixed the same at \$260. From the order thus reducing the assessment the defendant appeals. From the order fixing the assessment at \$260 the plaintiff appeals. The defendant perfected its appeal first.

James A. Rice, for appellant.

J. F. & W. R. Lacey, for appellee.

ADAMS, J.—The court assessed only the property within the city. The defendant contends that the court should have assessed all the property of the company within the county, and also that it should have assessed the property within the city higher than it did. The plaintiff contends that the court erred in assessing the property at all. Its position is that

Hull v. Stogdell.

telephone lines and property should be assessed in the mode provided for assessing telegraph lines and property; (Chap. 59, Laws of 1878; Miller's Code, 365;) and we have to say that we think that its position must be sustained. Both the telephone and telegraph are used for distant communication by means of wires stretched over different jurisdictions. The fundamental principle in each by which communication is secured is the same. It was held in *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis., 32; S. C., 21 N. W. Rep., 828, that a statute authorizing the formation of corporations for building, owning and operating telegraph lines was sufficient to authorize the formation of corporations for building, owning and operating telephone lines, the decision being based upon the identity of the principle by which communication in each case is secured. See, also, in this connection, *Attorney-general v. Edison Telephone Co.*, 6 Q. B. Div., 244. It is not to be denied, probably, that the telephone service is more restricted as a means of communication; but the difference in this respect is not such, we think, as to render inapplicable the mode of taxation provided for telegraph companies.

It follows that on the defendant's appeal the judgment must be affirmed and on the plaintiff's appeal reversed.

HULL V. STOGDELL.

1. **Landlord and Tenant: RENT ON FARM LEASE: WHEN DUE: CONSTRUCTION OF LEASE.** The lease on which this action for rent was brought provided that "when the crop matures, or any portion of it shall be fit for market, the rents shall become due." *Held* that the rent became due when the oats were in stack and the corn was all ripe, and that it was not necessary for the oats to be threshed and the corn gathered before an action for rent could be maintained.

Appeal from Hardin Circuit Court.

THURSDAY, OCTOBER 22.

ACTION to recover rent of land due upon a lease. The cause was tried to a jury, and judgment was rendered upon a verdict for defendant. Plaintiff appeals.

Parker & Childs, for appellant.

Wesley Martin, J. L. Kamrar and Huff & Pillsbury, for appellee.

BECK, CH. J.—I. The lease is for farming lands, and contains this condition, among others: "When the crop matures, or any portion of it shall be fit for the market, the rents shall become due." The action was commenced on the twenty-third day of October of the year in which the tenancy existed under the lease. A witness for plaintiff testified to defendant's possession and cultivation of the land under the lease. His further testimony was in this language: "The crop was matured when this action was begun. The oats—twenty acres of oats—were in the stack, and the corn was all ripe when the action was commenced. The defendant was gathering the corn and feeding it out. No part of the rent has been paid." Upon this evidence plaintiff rested, and thereupon, upon motion of defendant, the circuit court took the cause from the jury, and rendered a judgment for defendant for costs, on the ground that plaintiff's testimony showed that the rent was not due when the suit was commenced.

II. The ruling of the court was clearly wrong. The evidence for plaintiff clearly shows that the rent was due under the lease. It shows that the crop was mature when the suit was commenced. It shows, too, that the crop was fit for market at that time, for the oats were in the stack, the corn was all ripe, and defendant was gathering and feeding it. The

Samson, Adm'x, v. Samson et al.

corn was fit to gather, and the oats ready for threshing. The grain was fit for market. The condition of the lease does not mean that the crop must be *ready* for market in order to determine the maturity of the rent. If that were so, the defendant could have delayed threshing the oats and gathering the corn, thus indefinitely extending the time for the maturity of the rent.

The judgment of the circuit court must be

REVERSED.

SAMSON, ADM'X, v. SAMSON ET AL.

1. **Estates of Decedents: TRANSFER OF SECURITIES TO CHILDREN BEFORE DEATH: CONSIDERATION: EVIDENCE: BURDEN OF PROOF: TESTIMONY INCOMPETENT AGAINST ADMINISTRATRIX.** The children of the decedent were found, after his death, to have certain notes and mortgages which the widow and administratrix claimed as assets of the estate, but the children claimed that the decedent, before his death, had transferred the securities to them in consideration of an undertaking entered into by each of them to pay to the decedent semi-annually a certain sum during his life. *Held* that the burden of proof was upon the children to establish the making and delivery of the undertakings; and that the children themselves were incompetent to testify, as against the administratrix, to an agreement with the decedent concerning their delivery, and that the husband of one of the children, who was alleged to have joined with his wife in executing one of the undertakings, was also incompetent to testify to such agreement, under § 3639 of the Code.
2. **Gift: FROM FATHER TO CHILDREN: UNDUE INFLUENCE: EVIDENCE.** The evidence in this case considered, (see opinion,) and *held* to establish the fact that the securities in question were given by the decedent to his children a short time prior to his death, and to reveal no fraud or undue influence brought to bear upon the father by the children to induce him to make the gift.
3. **Husband and Wife: POWER TO DISPOSE OF PERSONAL PROPERTY: DISTRIBUTIVE SHARE OF SURVIVOR.** The law places no restriction or limitation on the power of the husband to make such disposition of his personal property during his life-time as he may elect, even though the wife is thereby deprived of the distributive share which otherwise would fall to her upon his death.

87	253
87	29
87	253
108	497
87	253
110	617

Samson, Adm'r, v. Samson et al.

4. **Estates of Decedents: NOTE BELONGING TO ESTATE WRONGFULLY DELIVERED BY CUSTODIAN TO MAKER: WHO LIABLE FOR.** If, as claimed, one of the defendants held an unpaid note belonging to the estate of decedent, and he wrongfully delivered it to the maker without payment, then the administratrix should have brought her action against the maker of the note to recover the amount thereof, and judgment therefor against the defendant who so delivered the note was erroneous.
5. **Practice in Supreme Court: COSTS OF BRINGING UP INCOMPETENT EVIDENCE TAXED TO PARTIES INTRODUCING IT.** Although defendants prevail on the appeal of this case, still, as plaintiff was obliged, in presenting her appeal, to bring up a large amount of incompetent testimony which defendants had taken, a proportionate share of the costs is taxed to defendants.

Appeal from Washington Circuit Court.

THURSDAY, OCTOBER 22.

PLAINTIFF is the widow of Francis Samson, deceased. She is also administratrix of the estate. The defendants H. F. Samson, L. M. Samson, O. L. Samson and Martha A. Daugherty are the surviving children of Francis Samson. Defendant Wilson Daugherty is the husband of Martha A. Daugherty. Francis Samson died on the twenty-first of April, 1881. A short time before his death defendants received into their possession notes and mortgages of the aggregate value of about \$10,000, which had formerly belonged to him, and about the same time he assigned to each of them (except Wilson Daugherty) bank stock of the value of \$1,000. Plaintiff brought this action in equity to compel defendants to account for this property, alleging, in one count of her petition, that they obtained possession of it in pursuance of a conspiracy which they had entered into to obtain possession of it during the life-time of their father, and cheat and defraud his estate out of it after his death; and in another count that the property is assets of the estate, and that defendants hold it in trust for the estate. Defendants deny these allegations, and allege that said Francis Samson, on the tenth of February, 1881, gave said property to them, intend-

Samson, Adm'x, v. Samson et al.

ing the same as a gift to them; and they allege that at the same time, and as part of the same transaction, they each executed to him an agreement, by which they bound themselves each to pay him semi-annually during his life the sum of \$93.50, and that these undertakings constituted a consideration for the transfer of the property to them. They each admit an indebtedness to the estate for a portion of the first semi-annual payments accruing under these contracts, and they brought the amounts into court and tendered them to plaintiff. The circuit court entered judgments against each of the defendants for the amount admitted to be due from him, and, in addition to this, it gave judgment against H. F. Samson for \$594.58; that being the amount of a promissory note executed by one E. Q. Elsey to Francis Samson, which he had in his possession and surrendered to the maker, but which was not included in the alleged distribution. Plaintiff and H. F. Samson appeal.

J. F. Henderson and L. C. Blanchard, for plaintiff.

H. & W. Scofield, for defendants.

REED, J.—I. The allegation in the first count of the petition, that the defendants obtained possession of the property in pursuance of a conspiracy which they had entered into to get possession of it during the life-time of Francis Samson, and to cheat and defraud his estate out of it after his death, is not established by the proof. Without setting out the evidence relied upon by plaintiff to establish this allegation, we deem it sufficient to say that in our judgment it fails entirely to prove the charge. Plaintiff contends, however, that upon the admissions contained in the answers she is entitled to recover on the other claim alleged in her petition, viz., that defendants hold the property in trust for the estate, unless they have shown that it was transferred to them by gift. For the purposes of this case it will be conceded that the burden is on the party who claims title to

Samson, Adm'x, v. Samson et al.

property under a gift to establish the gift. But, before entering upon the consideration of the question whether the evidence establishes a valid gift of the property to defendants, it is necessary to consider the claim made by them that their undertaking to make certain semi-annual payments to Francis Samson during his life-time constitutes a consideration for the transfer of the property to them. Their claim is that they each entered into a written agreement to pay him \$93.50 semi-annually during his life. It is not doubted that an undertaking of this character would constitute a consideration for the transfer of property. The burden of proof, however, is on defendants to establish the making and delivery of the undertakings. They have introduced in evidence what they claim are the undertakings entered into by them. But we think they have failed to show by any competent evidence that the undertakings were ever delivered to Francis Samson. It is shown that after his death each undertaking was in the hands of the party who executed it. Defendant's claim, however, that, when the instruments were executed, by agreement between them and Francis Samson they were deposited with L. M. Samson, one of the defendants, and that after the death of the father, as they were not deemed to be assets of the estate, they were surrendered to the obligors. But no evidence of this agreement to deposit the instruments with L. M. Samson, or of their delivery to Francis Samson, has been offered, except the testimony of the defendants themselves, and, under the provisions of Code, § 3639, they are not permitted to testify to the transaction. It was a personal transaction between them and him, and they are clearly not competent witnesses to it. And in this connection we deem it proper to say that in our opinion the testimony of each of the defendants with reference to the transaction in which it is claimed the property was delivered to them should be excluded. It is not claimed by counsel that any of the defendants, except Wilson Daugh-

1. ESTATES of
decedents:
transfer of
securities to
children
before death:
considera-
tion: evi-
dence: bur-
den of proof:
testimony in-
competent
against ad-
ministratrix.

erty, is competent to testify to the transaction. It is insisted, however, that, as the alleged gift was to his wife, and not to him, he is a competent witness to it. It is shown by his testimony that he was present during the greater part of the transaction, and that, at his wife's request, he joined with her in the undertaking to make the semi-annual payments to her father. By that act, we think, he became a party to the transaction in such sense as that the statute precludes him from testifying with reference to it. If the transfer of the property is to be upheld, then, it must be sustained on the theory that it was made as a gift to the defendants, for the evidence fails to show that it was supported by any substantial consideration.

II. We will inquire, then, whether the allegation that it was intended as a gift to the defendants is established. As stated above, in determining this question, the testimony of the defendants cannot be considered. It is shown by competent evidence that for some time prior to the ninth of February, 1881, the notes and mortgages in question had been in the possession of H. F. Samson. He resided in Louisa county, while his father lived in Washington. The notes and mortgages were against parties living in Louisa county, and they had been left with H. F. Samson for collection. On the ninth of February the deceased went to the house of his son, (H. F.,) and at his request the papers were delivered to him. On the next day, or the day following, defendant H. F. Samson, in the presence of his father, wrote the following words on the back of each of the notes, "payable to bearer," and the father signed his name under them, stating at the time that certain of the notes were to go to his son L. M. Samson, and certain others to Mrs. Daugherty, etc. The facts with reference to the delivery of the notes by H. F. to his father, and the subsequent indorsement of them by the father, and his declaration with reference to them, are proven by the testimony of the wife of H. F. Samson. She was present at the transactions,

2. GIFT: from father to children: evidence to establish.

Samson, Adm'r, v. Samson et al.

but was not a party to them. They may, therefore, be proven by her testimony. *Johnson v. Johnson*, 52 Iowa, 586. On the eleventh of February, deceased went to a national bank in which he was a stockholder, and on the books of the corporation made an assignment of \$1,000 of stock to each of his children, and on the same day returned to his home in Washington. Soon after this defendants had the notes and mortgages in their possession, and proceeded to make collections of the amounts due upon them, at the time asserting that they were the owners of them. Deceased knew of these facts, and made no denial of their right to them, and in conversation with third parties he stated that he had distributed a portion of his property among his children. We are well satisfied by the evidence that the property was voluntarily given by the deceased to defendants. No other reasonable conclusion can be reached from the facts proven.

III. Plaintiff contends, however, that, if the transaction was a gift, it is presumptively fraudulent, and that she will be entitled to recover unless defendants have shown that it was the free, unbiased act of the deceased. The rule that a gift obtained by a person standing in a confidential or fiduciary relation to the donor is *prima facie* void is well settled, and it has often been applied to transactions between parent and child. There was nothing, however, in the relations which are shown to have existed between the parties to the transaction in question which leads us to suspect that the deceased acted under the influence of his children in making the gift. There was no relation of special confidence between the parties, nor did any of them stand in a fiduciary relation to him. It is true that H. F. Samson had acted as his agent in making collections, and that he held the notes and mortgages in question in his possession for a time; but he had no other authority with reference to the matter except to receive the moneys paid and transmit them to his father. He had no general authority to

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Samson, Adm'r, v. Samson et al.

transact business for his father, but, as the parties indebted on the notes lived much nearer to him than to his father, the arrangement by which they were left with him for collection was a mere matter of convenience. None of the defendants lived with their father at the time of the transaction, and at that time he was in possession of all his mental faculties, and was quite active, physically, for a man of his age, (being sixty-nine years old,) and was in good health. He was not only fully able to attend to his affairs, but was in the habit constantly of giving attention to them, and he was a man of intelligence and character. The rule contended for is applied in every case when the relations of the parties, or the condition of the donor, were such that an undue influence may have been exercised by the other party over him. But nothing of the kind appears in this case. The transaction appears to have been the not unusual one of a father during his life-time distributing a portion of his property among his children, and there was nothing in the circumstances of the transaction which brings it within the reason of the rule. But if we were to concede that the burden of proving its validity was on the defendants, we would be compelled to find, under the evidence, that the gift was the free and voluntary act of the donor, and that the transaction was not tainted by any actual fraud.

IV. It is finally contended that said gift is void as against public policy. By the transaction the deceased was divested of much the greater part of his estate; and the argument of counsel is that, as the husband cannot by will divest his widow of the distributive share which the law gives her in his estate, he should not be permitted to accomplish that result by distributing it during his life-time to his heirs. The ready answer to this claim is that it is in the personal property of which the husband dies seized that the law gives the widow a distributive share. Code, § 2436. But during his life-time she has no inchoate right in such property, and he

3. HUSBAND
and wife:
power to dis-
pose of per-
sonal prop-
erty: dis-
tributive
share of sur-
vivor.

Samson, Adm'r, v. Samson et al.

may make such disposition of it during his life-time as he sees fit. If he sells it, or makes any other disposition of it by which he is divested of the ownership, the wife has no claim upon it after his death. The law has placed no restriction or limitation on the power of the husband to make such disposition of his personal property during his life-time as he may elect.

V. As to the appeal of H. F. Samson. The circuit court rendered judgment against him for the amount of a promissory note given by one E. G. Elsey to Francis Samson. This note was not included in the gift, and defendant had it in possession at the time of his father's death, and afterwards surrendered it to the maker. Defendant's claim is that this note was given to him by his father some years before his death, as a contribution by him to the expense of the education of defendant's son. But on the request of his father, made before his death, he surrendered it to the maker, who had for years been his father's pastor, and for whom he desired to make some provision out of his estate.

Plaintiff contends that the gift of this note to defendant is not proven by competent evidence. We find it unnecessary to determine whether this is so or not; for, if it be conceded that the note was assets of the estate, she is not entitled to recover the amount of the debt from defendant. If it belonged to the estate, and he had no authority to surrender it to the maker, the debt evidenced by it was not satisfied by the surrender, but the administratrix has the same right to proceed against the maker for the collection of the debt as though the note was in her possession.

As plaintiff, in prosecuting her appeal, was required to bring up a large amount of incompetent testimony, which defendants had taken, one-fourth of the cost of the abstract will be taxed to them. On plaintiff's appeal the judgment is affirmed. Reversed on defendant H. F. Samson's appeal.

4. ESTATES of decedents: note belonging to estate wrongfully delivered by custodian to maker: who liable for.

5. PRACTICE in supreme court: costs of bringing up incompetent evidence taxed to parties introducing it.

Snyder v. Miller, Ex'r, et al.

SNYDER V. MILLER, EX'R, ET AL.

1. **Will: CONSTRUCTION OF: PROVISION FOR WIFE—WHETHER IN LIEU OF DOWER OR NOT: RULE OF CONSTRUCTION IN SUCH CASES.** Unless a devise to the wife, to be ascertained either from express words or by necessary implication, is clearly intended to be in lieu of dower, she will not be compelled to elect which she will take, but will be entitled to both. But in this case, where the testator in the second paragraph of his will gives certain property to his wife by description, and in the third, fourth and fifth paragraphs gives certain legacies, and in the sixth paragraph disposes of all the residue of his property without description, and then, in the seventh paragraph, provides for the sale of all the remainder of his real estate for the purpose of carrying out the devises named in the sixth paragraph, *held* that the manifest intent of the testator would be defeated by allowing the widow to take the portion given her by the will, and also one-third of the real estate not devised to her. See copy of will set out in opinion.

Appeal from Van Buren District Court.

THURSDAY, OCTOBER 22.

THE plaintiff is the widow of Jacob Snyder, deceased, who made his last will and testament in January, 1880, and died in the month of August, 1883. It is claimed in the petition that the provisions in the will for the plaintiff were not intended to be in lieu of her dower or distributive share in the estate, and the demand is made that one-third of that part of the real estate not devised to her be set apart as her distributive share. The defendants, who are the children and heirs of the testator and devisees under the will, contest the right of the plaintiff to take under the will and also one-third of the residue of the estate. The cause was submitted to the court below upon a demurrer to the answers of the defendants. The court sustained the demurrers, thereby sustaining the claim of the plaintiff. Defendants appeal.

67	261
81	726
67	261
90	609
67	261
395	733
67	261
97	709
67	261
121	71
67	261
1129	603

Lea, Wherry & Walker and *McCrary & Hagerman*, for appellants.

Robert H. Starr and *Sloan, Work & Brown*, for appellee.

ROTHROCK, J.—The will was admitted to probate on the thirteenth day of November, 1883, after due and legal notice of the provision therein made for the plaintiff was given to her by the other parties interested therein, and the plaintiff failed to consent thereto of record as required by section 2452 of the Code. She demands that, if it be found that the provision made for her by the will is not in addition to her dower-right of one-third in value of the real estate, but that it is inconsistent therewith, there be set apart and admeasured to her one-third in value of all the real estate of which her husband died seized. The question presented requires a construction of the will, and to the end that our construction of the instrument may be properly understood, it is necessary that it be set out in the opinion. It is as follows:

"I, Jacob Snyder, of the city of Keosauqua, Van Buren county, being of sound and disposing mind, but weak and frail in body, do hereby constitute and make this my last will and testament, hereby revoking all or any former wills by me made.

"1st. I desire that all my just debts and funeral expenses be paid out of any money I may have on hand at my death, and if I should have no money on hand at that time, then out of my personal property that I may leave.

"2d. I will and bequeath to my beloved wife, Martha Jane Snyder, if she shall survive me, our homestead, situated in block seventy-five, (75,) in the city of Keosauqua, Iowa, with all appurtenances thereto belonging; also the south half of the south half of the southwest quarter of section nineteen, (19) township sixty-nine, (69,) of range nine, (9,) in Van Buren county, to have and to hold absolutely in fee-simple;

Snyder v. Miller, Ex'r, et al.

also the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section thirty-five, (35,) township sixty-nine, (69,) range ten, (10,) to use during her lifetime as she may see fit. I also give and bequeath unto my beloved wife, aforesaid, the residue of my personal property after the payment of my debts, save and except notes and judgments which I desire to make other disposition of hereafter.

"3d. I give and bequeath to my son Raymond B. Snyder the sum of three hundred dollars to assist him in obtaining an education to qualify him to enter some profession, and I desire that his mother, Martha Jane Snyder, be made his guardian to carry out this bequest.

"4th. I give and bequeath to my son Doras Lincoln Snyder the sum of one hundred dollars out of the proceeds of the sale of my land as hereinafter provided.

"5th. I give and bequeath to my daughter Ione E. Snyder, and to my sons Cassius S. Snyder and Elmer S. Snyder, to each the sum of one dollar.

"6th. The residue of my property, both personal and real, I give and bequeath as follows: To each of my five children hereinafter named one-fifth part, to-wit: Mary Jane Betts, of Belleville, Illinois, one share; Rebecca Margaret Mahon, of Philadelphia, Penn., one share; Frances Elizabeth Porter, of Tuscarawas county, Ohio, one share; George Edmond Snyder, residence not known, one share; Raymond Beecher Snyder, Keosauqua, one share; with this further stipulation and restriction as to Rebecca Margaret Mahon's share in the above distribution, that, in case of her death without heirs of her own body, the estate hereby granted to her shall revert and be distributed equally among the remaining four children in the above class; and in case George Edmond Snyder shall never be found, or in the event of his death without issue, his share, as above, shall revert to the other four in the above class, share and share alike, with the same restriction as to the share of Margaret Mahon as above specified.

"7th. I hereby appoint Henry Miller * * * my executor of this my last will and testament, and I desire

Snyder v. Miller, Ex'r, et al.

that my real estate of which I may die seized, which is not herein otherwise disposed of, be sold and converted into money, and that my mortgages and judgments be collected and distributed as by the sixth clause hereof specified, except so much as may be necessary to pay the special legacies herein granted, and expenses of executing this will; but I desire that my farms in Chequest township be held until they can be sold for at least eighteen dollars per acre."

This will disposes of all the property of the testator, both real and personal.

By the second paragraph certain property is devised to the wife. The third, fourth and fifth paragraphs provide for specific legacies to the persons therein named. By the sixth paragraph the residue of the property of the testator is disposed of to the persons therein named. In the seventh paragraph, after the appointment of an executor, there is a direction that all the real estate *which is not herein otherwise disposed of* be sold and converted into money, and mortgages and judgments collected and distributed as by the sixth clause of the will, except so much as may be necessary to pay the special legacies. We are required to determine whether the claim made by the widow, that she is entitled to the devises contained in the second paragraph, and to one-third in fee of all the residue of the real estate, is so repugnant to and inconsistent with the will that to allow both claims to stand would defeat the provisions of the will. As it is stated in *Corriell v. Ham*, 2 Iowa, 552, "the claim of dower must defeat or interrupt or disappoint some provision of the will;" and, as it is stated in *Clark v. Griffith*, 4 Iowa, 405, "unless a devise to the wife, to be ascertained either from express words or by necessary implication, is intended to be in lieu of dower, she will not be compelled to elect which she will take, but will be entitled to both. If it is left in doubt whether it was the testator's intention that she should take the devise in addition to the dower, she will not be put to her election." And see, also, *Church v. Bull*, 2

Snyder v. Miller, Ex'r, et al.

Denio, 430; *Adsit v. Adsit*, 2 Johns, Ch., 448; and *Smith v. Kniskern*, 4 Johns, Ch., 9.

There have been quite a number of cases in this court, in addition to those above cited, where the court has been called upon to determine whether, under a will, a wife is entitled to take both dower and the provisions made for her in the will. See *Cain v. Cain*, 23 Iowa, 31; *Metteer v. Wiley*, 34 Id., 214; *Watrous v. Winn*, 37 Id., 72; *Van Guilder v. Justice*, 56 Id., 669. In these, and possibly other cases which might be cited, this court has adhered to the rule above announced. We have not given the facts in any of the cases cited, because it is apparent that each case must be determined upon the facts as they appear in the record; that is, as no two of the wills construed in the cases are in the same language, and as no one of them is in the language of the will in the case at bar, we are required to apply the rule to this case, and can receive but little aid from any adjudged case.

We are to inquire what was the plain and obvious intent of the testator as to the share his wife should have in the estate. In other words, if the widow is allowed to take under the will, and in addition be endowed under the law, does such taking plainly defeat other provisions of the will? In our opinion, if she should be allowed to take one-third of the real estate not devised to her by the will, the shares of the persons named in the sixth paragraph would be one-third less than the testator plainly intended they should be. The manifest meaning of this will, as we understand it, is that the testator gives certain property to his wife by description, then he gives certain specific legacies, then he disposes of all the residue of his property without description, and then in the last paragraph he provides for the sale of all the remainder of his real estate for the purpose of carrying out the devise as to the persons named in the sixth paragraph. The sixth and seventh paragraphs must be construed together, because they both have reference to the residue of

Kelso v. Fitzgerald.

the estate and the manner in which it is to be distributed. And the reference in the seventh paragraph to the real estate "not herein otherwise disposed of," means all of his real estate except such as is disposed of by description in the second paragraph.

We cannot adopt the claim of appellee's counsel that, in the direction to sell the real estate in the seventh paragraph, and in the disposition of the residue of his property in the sixth paragraph, the testator did not mean to dispose of all the real estate,—all of the property,—but only such interest in it as he owned, which was two-thirds; the one-third being the property of his wife. This construction appears to us to be strained and unnatural. He plainly directs the sale of the real estate,—the land,—and not any interest in the land. If he had intended to direct the sale of an undivided two-thirds of the land, he surely would have so stated.

Our conclusion is that, taking this will by its four corners, and giving it a plain, natural and common-sense construction, it is manifest that the testator intended the provision therein made for the plaintiff to be in lieu of dower or a distributive share, and to hold otherwise would, we think, defeat the intention of the testator, and in effect nullify his will.

REVERSED.

67	266
89	277
67	296
118	589

KELSO V. FITZGERALD.

1. **Evidence:** OPINIONS AND LEGAL CONCLUSIONS EXCLUDED: **EXAMPLES.** It is not competent for a witness to state that the execution of a new note and mortgage had the legal effect to release a surety on a prior note; nor is it competent for him to testify to his understanding of an agreement, in response to a question as to what the agreement was; and after the plaintiff has stated that he does not remember what he paid for the note in suit, it is not competent to ask him to state "something near" what he paid for it.

Kelso v. Fitzgerald.

2. Attorney's Fees: EVIDENCE AS BASIS FOR RECOVERY OF: PRACTICE.

Where a note sued on provides for reasonable attorney's fees, to be taxed as part of the costs, it is the better practice, where the trial is to the court, to determine the question and amount of such fees after the decision of the main cause, because, if there should be no recovery on the note, there would be no occasion to inquire into the question of attorney's fees.

3. Practice in Supreme Court: PRESUMPTION IN FAVOR OF TRIAL COURT. It will be presumed that the judgment of the trial court in allowing attorneys fees was based upon proper evidence in relation thereto, unless the contrary affirmatively appears from the record.

4. ———: ABSTRACT DENIED: WHEN TRANSCRIPT NOT CONSULTED.

Where a case must be affirmed upon the showing made by appellant's abstract, there is no occasion to examine the transcript to see whether or not that abstract is correct, even though appellee denies its correctness.

Appeal from Hardin Circuit Court.

FRIDAY, OCTOBER 23.

ACTION upon a promissory note. Trial to the court without a jury, and judgment for plaintiff. Defendant appeals.

Brown & Carney, for appellant.

J. H. Scales, for appellee.

BECK, CH. J.—I. The defense to the action set up in the pleadings, which is relied upon in this court, is that defendant signed the note as a surety of his co-defendant Catherine McMannus, who does not appear in this court, and that subsequently she executed another note to the payee, which was secured by mortgage, under an agreement with the payee that defendant should be discharged from liability upon the note.

II. Mrs. McMannus, in behalf of defendant, testified that the note in suit was given for borrowed money, and that defendant signed it as her surety. Subsequently she obtained \$100 more of the payee. The following quotation from the abstract shows, more

1. EVIDENCE:
opinions and
legal conclusions
excluded:
examples.

Kelso v. Fitzgerald.

clearly than it could be made to appear by a statement, an objection to evidence given by her, and the ruling of the court thereon. "I returned and got more money from Mr. Bligh, [the payee of the note.] *Question.* More money? *Answer.* Yes, sir, one hundred dollars more, and I gave to Mr. Bligh the mortgage for both, releasing Mr. Fitzgerald [the defendant] off the first note." (Plaintiff objects to answer because stating a legal conclusion. Objection sustained, and defendant excepts.)

It is insisted that the ruling shown by this extract from the abstract is erroneous. It clearly appears that the objection was made and sustained to that part of the answer which states the conclusion that the act of executing the mortgage released the defendant. That part of the answer was clearly incompetent, and the objection thereto was rightly sustained. It is shown without dispute by other portions of the evidence that the additional \$100 was borrowed by Mrs. McMannus and a mortgage given therefor, and the part of the last answer above set out which we have not given, and other evidence, is to the effect that the mortgage was given under an agreement with the payee that the defendant should be released from the note. The court evidently held by the ruling that the conclusion stated in the answer, that defendant was discharged by the act of giving the mortgage, was alone excluded, and that the agreement referred to, and other matters pertaining to the transaction, were competent.

III. In another answer the same witness states what the court below evidently inferred to be her "understanding" of the agreement between herself and Bligh. The
THE SAME. answer was stricken out, and this is complained of by defendant. She does not attempt to state in her answer the agreement between her and Bligh, but simply "the understanding" touching it. This evidence was not a competent answer to the question, which calls for the agreement itself. In other parts of her testimony she stated the agreement.

Kelso v. Fitzgerald.

IV. The plaintiff testified that he had purchased the note, but that he did not remember what he paid for it. He was then asked if he could not state "somewhere near" what he paid for the note. An objection to the question was rightly sustained. The witness stated that he did not remember the sum paid for the note. His opinion of the amount paid would have been of no benefit to defendant, for, as he had bought the note after due, it was subject to all defenses in his hands that could have been pleaded against the payee, without regard to the consideration paid for it by plaintiffs.

V. It is insisted that the evidence fails to support the judgment. But it cannot be said that there is such absence of evidence in its support as will authorize us to interfere.

VI. The abstract shows that a sum was allowed by the judgment for attorney's fees of plaintiff, under a provision of the note to the effect that reasonable attorney's fees should be allowed and taxed with the costs. It is not shown by the abstract that any evidence as to the amount of these fees was introduced, nor is it shown that no evidence upon the subject was introduced. It is upon this state of facts claimed by defendant that attorney's fees were erroneously allowed. As the note provides that these fees should be taxed with the costs, they could, in the usual course of practice, be determined after the trial and decision by the court. Indeed, this appears to be the better practice in order to hasten the disposition of the case; for if the finding should be for defendant, there would be no necessity to inquire as to the amount of the attorney's fees. We cannot, therefore, in the absence of any showing in the abstract upon the subject, presume that no evidence was introduced thereon, but will rather presume that there was, and that the judgment is in accord therewith.

VII. The plaintiff insists that defendant's abstract is not correct, and files an amendment thereto, which is denied by

2. ATTORNEY'S fees: evidence as basis for recovery of: practice.

3. PRACTICE in supreme court: presumption in favor of trial court.

Horton v. Ambrosen et al.

4. ———: abstract denied: when transcript not consulted. defendant. This would ordinarily send us to the transcript to determine the matters thus put in issue. But we find it unnecessary to consult the transcript, for the reason that, considering the abstract as correct, as we have considered it, no errors appear requiring a reversal of the case.

The foregoing discussion disposes of all questions in the case. The judgment of the circuit court is

AFFIRMED.

HORTON V. AMBROSEN ET AL.

1. **Fraud and Duress: EVIDENCE.** Upon consideration of the evidence, (not set out in the opinion,) *held* that the fraud and duress pleaded as a defense to the note and mortgage in suit were not established.
2. **Practice in Supreme Court: CONFLICT OF ABSTRACTS: WHEN DISREGARDED.** When a cause must be affirmed on such portions of the abstract as are not denied, the court has no occasion to resort to the transcript to settle disputed points in the record.

Appeal from Winnebago Circuit Court. .

FRIDAY, OCTOBER 23.

ACTION in chancery to foreclose a mortgage. There was a decree in the court below granting the relief prayed for in the petition. Defendants appeal.

Ransom & Olmsted and H. Wilber, for appellants.

Pickering, Hartley & Harwood, for appellee.

BECK, CH. J.—I. Various facts are pleaded as defenses, as that the note and mortgage in suit were procured by fraud and duress; that defendants had purchased the land mortgaged of plaintiff and received a deed therefor, and had given notes and a mortgage upon which they made certain payments; that this

Horton v. Ambrosen et al.

deed was obtained by plaintiff from them by fraud; and that, through the fraud and threats of plaintiff, defendants were induced to execute the note and mortgage in suit for a greater amount than was due for the purchase of the land, which was secured by the first mortgage. The case is hardly presented to us with sufficient clearness, but it is obvious that the points relied upon by defendants' counsel involve the invalidity of the note and mortgage by reason of fraud and duress, and the amount due thereon, which they insist is reduced by certain payments not allowed and credited upon the debt.

II. There is no doubtful question of law in the case; it turns wholly upon the facts. It is not our custom to discuss the evidence in such cases, but to simply state our conclusions thereon. We do not think the evidence sustains defendants' position that the mortgage is void for fraud and duress inducing its execution. The deed of the land executed by plaintiff to defendants may have been improperly and wrongfully obtained and held by plaintiff. But we do not discover what bearing that act could have had inducing defendants to execute the note and mortgage in suit, which were made upon a settlement of the amount due plaintiff for the land. This settlement is not shown to have been procured by fraud or misrepresentations, and, considering the whole evidence, we are not prepared to say that it did not result in justly determining the amount due plaintiff. That amount, as fixed by the settlement and the mortgage, was for a long time acquiesced in by defendants, and recognized by an accounting, and by payments upon the mortgage. We are unable to say from the evidence that defendants have not been credited for all sums they have paid upon the debt.

III. Plaintiff files an amended abstract which in some particulars is not admitted to be correct by defendants. We have found it unnecessary to go to the record, for the reason that we decide the case upon the abstract of defendants, and those portions of plaintiff's abstract which are not denied. Some

1. FRAUD: and
duress: evi-
dence.

2. PRACTICE
in supreme
court: con-
flict of ab-
stracts: when
disregarded.

Gere v. The Council Bluffs Ins. Co.

provisions of the decree are not brought in question. They need not be otherwise referred to here.

The decree of the circuit court will be affirmed as it stands, and a *procedendo* to that effect will be issued to the court below.

AFFIRMED.

GERE V. THE COUNCIL BLUFFS INS. CO.

1. **Insurance: PROVISION IN POLICY FOR ARBITRATION: CONDITION PRECEDENT TO ACTION: EVIDENCE.** The policies sued on contained a condition in these words: "In case differences shall arise as to the amount of loss or damage, the subject shall, at the request of either party, be referred to * * * arbitrators * * * and their award in writing shall be binding as to the amount of such loss or damage." *Held* that a submission to arbitrators under this agreement was not a condition precedent to the maintenance of an action upon the policies, and that a demurrer to the petition, based upon a neglect and refusal of plaintiff to so submit to arbitrators, was properly overruled. Whether, on the trial of the cause, the amount of the loss or damage could have been proved, against defendant's objection, by any other evidence than the award of arbitrators, is a question suggested but not decided, because it does not arise upon the record.
2. **Evidence: VALUE OF THOROUGHbred STALLION: COMPETENCY OF WITNESS.** A farmer engaged in raising horses for the market cannot be deemed wholly incompetent to testify to the value of a thoroughbred stallion with which he is acquainted.
3. —: —: **PRICE AT PRIOR SALE.** The price at which a thoroughbred stallion was sold in another state was properly excluded as evidence of his value eighteen months after such sale, especially where it appears that he was not in the same condition at the times referred to.
4. **Insurance: FALSE REPRESENTATIONS AS TO VALUE: EVIDENCE.** The owner of a horse had him insured upon the statement that he cost him \$1,200. *Held* that evidence of a prior sale of the horse for \$500 to the person of whom the insured bought him did not tend to prove that the statement made by the assured was false, and was properly excluded.
5. —: **VALUE OF PROPERTY DESTROYED: INSTRUCTION.** When the insured property which was destroyed was not shown to have a distinctly recognized market value, the court properly instructed the jury to allow the *fair* value of the property.

67	272
85	206
67	272
86	548
67	272
92	128
67	272
96	76
101	582
67	272
108	314
67	272
104	449
104	901
67	272
107	64
67	272
114	187
67	272
116	321
67	272
130	671
67	272
132	181

Gere v. The Council Bluffs Ins. Co.

6. ———: ACTION BY ASSIGNEE OF POLICY: EVIDENCE OF AMOUNT PAID FOR POLICY. Where defendant admitted the assignment by the assured to the plaintiff of his claim under the policy, it was immaterial whether plaintiff paid anything for the claim or not, as no recovery could afterwards be had by the assignor.
7. Practice in Supreme Court: JUDGMENT TOO GREAT: REMITTITUR: COSTS. Where a judgment appealed from is erroneous only in being for too large a sum, but the appellee admits the excess and offers to remit it, the judgment will be modified and affirmed, but the appellee must pay the costs of the appeal.

Appeal from Cherokee Circuit Court.

FRIDAY, OCTOBER 23.

ACTION upon two policies of fire insurance. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

E. C. Herrick and *Sapp & Pusey*, for appellant.

A. F. Meservey and *J. D. F. Smith*, for appellee.

ADAMS, J.—I. The policies contained a condition in these words: "In case differences shall arise as to the amount of loss or damage, the subject shall, at the request of either party, be referred to two competent and disinterested arbitrators, each party to select one, (and in case of disagreement they to select a third,) who shall ascertain the damages on each article; and their award, in writing, shall be binding as to the amount of such loss or damage." The loss in question occurred on the sixteenth day of August, 1883. Proofs of loss were made on the fourth day of the next month, and the amount due upon the policies became payable at that time. The company, however, did not pay, and the plaintiff, Mrs. N. M. Gere, commenced this her action on the tenth day of January, 1884. On the nineteenth day of April, 1884, the defendant served a written request upon the plaintiff for an arbitration of the

1. INSURANCE:
provision in
policy for
arbitration:
condition:
precedent to
action.

amount of the loss. To this request we infer that the plaintiff paid no attention. On the twenty-first day of April, 1884, the defendant filed an answer setting out the provision of the policy in respect to an arbitration, and pleading the service of the written request. To so much of the answer as pleaded the request for arbitration the plaintiff demurred, and the demurrer was sustained. The defendant assigns as error the ruling upon the demurrer.

The agreement to arbitrate the amount of the loss, and the failure to choose an arbitrator after service of the written request, would not, in our opinion, constitute a defense, unless the arbitration should be deemed a condition precedent to the right to sue. The defendant, indeed, as we understand, does not contend that it would. Its contention is that an arbitration is a condition precedent to a right to sue. But it is to be observed that it is not expressly so provided, nor, indeed, is an arbitration to be had at all, except one of the parties requests it. The agreement, then, to arbitrate the amount of loss on the written request of either party was, we think, nothing more than a mode of providing what should be deemed conclusive evidence of one of the facts. Whether the written request was served too late or not we need not determine. If it was not too late, the plaintiff, at the time the answer was filed, might still be allowed to choose an arbitrator, and procure her evidence in the mode agreed. If the defendant, upon the trial, had objected to the testimony which was offered as to the amount of the loss, on the ground that the parties had agreed upon another mode of establishing such fact, possibly the defendant's objection should have been sustained. But we see no such objection. It had proceeded upon the theory that the failure to ascertain the amount of loss in the mode agreed was a defense, and so pleaded it, and relied simply upon saving an exception to the ruling of the court in holding that it was not a defense. What should have been the ruling of the court if objection had been made to the testimony offered in regard to the

amount of the loss we do not determine. In our opinion the ruling of the court upon the demurrer was correct.

II. One of the policies was upon a stallion alleged to be a thoroughbred Clydesdale, and of the value of \$1,000. To

2. EVIDENCE:
value of
thoroughbred
stallion:
competency
of witnesses.

prove his value the plaintiff introduced as witnesses one Condon and one Hunter. The defendant objected to their being examined, the objection being based upon the ground that it did not appear that they were competent to testify. The objection was overruled, and the defendant assigns the ruling as error. The witnesses showed that they were engaged in farming generally and stock-raising, but were not able to speak with much confidence as to the breed of the horse in question. But they showed that they were acquainted with the horse, and claimed to know his value. We are by no means certain that a farmer engaged in raising horses for the market, and directly interested in stallions, may not exercise about as accurate a judgment as any one in regard to the value of a stallion with which he is acquainted; but, whether this be so or not, it appears reasonably clear to us that he cannot be deemed wholly incompetent. We think, therefore, that in allowing the witnesses to testify the court did not err.

III. The defendant, for the purpose of showing the value of the horse to be considerably less than the witnesses for the
3. —: —: plaintiff had estimated, offered to show what the
price at
prior sale. horse was sold for in Nebraska about eighteen months before; but the court ruled such evidence to be inadmissible, and the defendant assigns the ruling as error. Possibly, under some circumstances, the price for which a thing has been sold might be proven as a fact tending to show the value. But it is manifest that such evidence, at best, would not be very reliable. In the case before us the alleged sale was made eighteen months before, and in a different state, and it is shown also that the horse at that time was not in as good a condition. We think that the evidence offered would

have been more liable to mislead than to afford any reliable ground upon which to base a verdict.

IV. The defendant, however, insists that the evidence was admissible for the purpose of showing a false representation at the time the horse was insured. The policy false representations as was not issued to the plaintiff, but to one F. A. to value: evidence. Gere, who assigned it to the plaintiff. It was shown that he stated, at the time the policy was issued, that the horse cost him \$1,200. The defendant claimed the right to show the terms of the Nebraska sale, for the purpose of showing that the insured paid only \$500. To this it is sufficient to reply that the Nebraska sale was not made to the insured. That sale was made to the plaintiff, the wife of the insured, and the insured afterwards purchased the horse of her.

V. The court instructed the jury to allow the fair value of the property. The defendant assigns as error the giving of this instruction. In our opinion there is no error in the instruction. If there had been evidence that the property had a distinctly recognized market value, it might have been better to have instructed the jury to allow the market value; but there was no such evidence, and the instruction to allow the fair value appears to us to be unobjectionable.

VI. The plaintiff claimed to own the claim accruing upon the policy issued upon the horse by virtue of an assignment of the claim to her by the insured. The defendant admitted the assignment, but averred that it was not made in good faith, and was only for the purpose of the action. On the trial the defendant asked Mrs. Gere what she paid for an assignment of the claim, but the court disallowed the question, and the defendant assigns the ruling as error. The defendant having admitted the assignment, we do not think it was material what the plaintiff paid, if anything. If the claim was assigned in fact, though for the purpose of the action, the defendant would be sufficiently

Gere v. The Council Bluffs Ins. Co.

protected. No recovery could be afterwards had by the assignor.

We see no error, and the judgment must be

AFFIRMED.

SUPPLEMENTAL OPINION.

BY THE COURT. The defendant has filed a petition for rehearing in this case, and calls our attention, among other things, to the fact that interest was allowed from the date of filing preliminary proofs. In this the court erred, and in the opinion filed we failed to notice the point. We do not, however, find it necessary to grant a rehearing upon the point, because the appellee concedes that the interest was computed from a wrong date, and that by reason of the mistake the judgment is too large by \$3.97, and the appellee offers to remit that amount. Under the concession and offer, the judgment rendered should be reduced by the amount of \$3.97, and the judgment of affirmance heretofore entered is set aside, and the judgment below is modified and affirmed, and the costs of this appeal are to be taxes to the appellee.

The petition for a rehearing raises some other points, but we think that the opinion filed is correct except as above set forth. The petition, therefore, is overruled.

7. PRACTICE
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SHERMERHORN V. WEBBER ET AL. (Four cases.)

LUNDBECK V. WIEST ET AL. (Nine cases.)

FARLEY V. PALEN ET AL. (Seven cases.)

1. **Intoxicating Liquors: NUISANCE: INJUNCTION.** *Littleton v. Fritz*, 65 Iowa, 488, followed.

Appeals from Dubuque Circuit Court.

FRIDAY, OCTOBER 23.

AN action was brought by each of the respective plaintiffs against the respective defendants, charging each with maintaining a nuisance in keeping a saloon, and in selling intoxicating liquors therein in violation of law; and the respective plaintiffs prayed that an injunction issue in the actions, and that the defendants be restrained from selling intoxicating liquors, and be restrained from keeping intoxicating liquors with intent to sell the same. The defendants demurred, respectively, to the petition in each case, and their demurrers were sustained. The plaintiffs elected to stand upon their respective petitions, and judgment was rendered against them for costs. They appeal.

S. P. Adams and Jed. Lake, for appellants.

Fouke & Lyon and McCeney & O'Donnell, for appellees.

PER CURIAM. These cases are submitted together as involving the same questions of law. The questions involved were determined in *Littleton v. Fritz*, 65 Iowa, 488. Following the decision in that case, we have to say that we think the court erred in sustaining the demurrer, and the several judgments must be

REVERSED.

RUSSELL & Co. v. JOHNSTON ET AL.

1. **Appeal to Supreme Court: TRIAL DE NOVO: CERTIFICATION OF EVIDENCE: TIME.** In order to a trial *de novo* in this court, it must affirmatively appear that the evidence was certified by the judge within the time for taking an appeal. Chap. 35, Laws of 1882; *Mitchell v. Laub*, 59 Iowa, 36. Accordingly, where the judge's certificate is not dated, a trial *de novo* cannot be had.
2. **Practice in Supreme Court: ASSIGNMENT OF ERRORS: TIME OF FILING.** An assignment of errors not filed ten days before the first day of the term, and not until after appellee's argument is filed, cannot be considered. Code, § 3183; *Betts v. City of Glenwood*, 52 Iowa, 124.

Appeal from Tama Circuit Court.

FRIDAY, OCTOBER 23.

ACTION to enforce a mechanic's lien. Defendant W. F. Johnston entered into a contract with one J. T. Elliot for the erection by the latter of a dwelling-house and a barn on lands belonging to the former. Elliot contracted to furnish all material and perform all the labor necessary in the erection of said building. He purchased certain material from plaintiffs to be used therein. They filed the statement required by the statute in the office of the clerk of the district court, and afterwards instituted this suit, in which they ask that their lien be established and enforced. The judgment of the circuit court was for defendants, and plaintiffs appeal.

J. A. Merritt and Struble & Kinne, for appellants.

E. C. Ebersole, for appellees.

REED, J.—This is an equitable action, and was tried in the circuit court in the manner prescribed by statute for trying

equitable actions. The evidence was taken down by the short-hand reporter, and a transcript was afterwards filed in the clerk's office. Attached

1. APPEAL TO
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 Russell & Co. v. Johnston et al.

to this transcript is a certificate of the judge of the circuit court to the effect that it contains all of evidence offered on the trial of the cause. This certificate is not dated. Appellants allege in their abstract that the evidence was duly certified by the trial judge; but this allegation is denied by appellee in an amended abstract filed by him.

Counsel for appellee contends that upon this record the cause is not triable *de novo* in this court, and we think the correctness of this position must be admitted. Under section 2742, McClain's Statute (chapter 35, Acts Nineteenth General Assembly,) this court has jurisdiction to try an equitable action anew only when the evidence has been taken down in writing and certified by the judge within the time allowed for the appeal in the cause and made part of the record. It is impossible to determine from the record before us whether the certificate was made within the time prescribed or not. It should be made to appear affirmatively that it was signed at the proper time. We cannot presume that it was so signed. See *Mitchell v. Laub*, 59 Iowa, 36.

Appellants, at the time they filed their reply to appellees' argument, also filed an assignment of errors, and they ask us, in case we are not able to try the cause anew, to determine it on the errors assigned. But the assignment of errors was not filed ten days before the first day of the term, and not until appellants' argument was filed. We cannot therefore consider it. See Code, § 3183; *Betts v. City of Glenwood*, 52 Iowa, 124; *Independent Dist. of Crocker v. Independent Dist. of Ankeny*, 48 Id., 206.

The appeal will be

DISMISSED.

2. PRACTICE
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STATE V. HOFFMAN.

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- 1. Criminal Law :** DEMURRER TO INDICTMENT PARTIALLY SUSTAINED AND CAUSE DISMISSED: NO APPEAL BY DEFENDANT. There was a demurrer to the indictment based upon two grounds. The court overruled the demurrer on one of the grounds, but sustained it on the other ground, and ordered that the indictment and all the proceedings under it be dismissed. *Held* that defendant was in no further peril, and could not maintain an appeal from the judgment of the court in overruling the demurrer on the one ground.

Appeal from Carroll District Court.

FRIDAY, OCTOBER 23.

THE defendant was indicted for cheating by false pretenses. A demurrer to the indictment was sustained as to one ground and overruled as to another. Defendant appeals from the judgment overruling the demurrer as to one ground.

Cole, McVey & Clark, for appellant.

A. J. Baker, Attorney-general, for the State.

BECK, CH. J.—The demurrer to the indictment was based upon two grounds. It was sustained as to one, and overruled as to the other. The district court thereupon adjudged and ordered that the indictment and all further proceedings thereunder be dismissed. In our opinion an appeal will not lie in this case, for the reason that, under the decision of the district court, it is finally ended, and no further proceedings can be had therein. Defendant is in no peril from the indictment, for it exists no longer as a charge of crime against him. It is as though it had never been—utterly deprived of all force and effect. It is true that defendant may be again indicted for the same offense, and it is equally true that he may never be, or that, if again indicted, the charge will not be in the same form as it was presented in the defunct

Paine v. Frost et al.

indictment. The case is as though a party should appeal to this court stating that he feared an indictment, and alleging errors which might exist in an imaginary charge against him, asking us to pass upon them. We can decide only real questions in pending cases. We cannot imagine questions that may arise in supposed or possible cases, and settle them, in order to protect the property or liberty of a citizen in cases that may hereafter arise. This view of the case was urged in oral argument by the attorney-general. The appeal is

DISMISSED.

PAINE V. FROST ET AL.

1. **Mistake in Payment: EVIDENCE.** The evidence in this case considered (but not set out in the opinion) and *held* to warrant the judgment of the trial court based upon a finding of mistake in the payment of money.
2. **Practice in Supreme Court: ARGUMENT: STATEMENTS OUTSIDE OF RECORD: DISTRICT JUDGE ASSAILED: COUNSEL CENSURED.** One of the counsel in this cause is censured for making in his argument in this court a statement of alleged facts, outside of the record, and claiming that they impeach the judicial conduct of the district judge who tried the case below.

Appeal from Carroll District Court.

FRIDAY, OCTOBER 23.

ACTION in equity to correct certain alleged mistakes. There was a decree for the plaintiff. The defendants appeal.

F. M. Powers, for appellants, G. W. and J. M. Frost.

M. W. Beach and *F. M. Davenport*, for appellant, H. W. Davenport.

George W. Paine, pro se.

ADAMS, J.—The defendant Davenport became indebted to the defendant J. M. Frost, who was indebted to the defendant George W. Frost. Davenport was also indebted to one Culbertson. For the purpose of paying his indebtedness he engaged the plaintiff to assist him by making to him a loan of so much money as might be necessary for such purpose. Money by way of loan to Davenport was paid by plaintiff to Culbertson and to J. M. Frost, and to George W. Frost as creditor of J. M. Frost, which latter payment was to operate as a payment of Davenport's debt to J. M. Frost.

The plaintiff avers in substance that, through the carelessness and fault of Davenport, he paid both the Frosts more than they were entitled to receive.

The court found that mistakes were made in the payment of money by the plaintiff, and that they had occurred through Davenport's fault, and to correct the mistakes it rendered judgment in the plaintiff's favor against J. M. Frost for \$147.67, and against George W. Frost for \$591.70, and against Davenport for \$71.46, and decreed, also, that Davenport should be secondarily liable for the amount found due the Frosts.

It seems to be undisputed that some mistakes were made, but as to the extent of the mistakes, and as to whether they were corrected or not, the evidence is complicated and conflicting. We cannot say that it is entirely certain as to what the fact is, but we have all reached the conclusion, upon a separate reading of the evidence, that the decree of the district court should be affirmed. In passing upon questions of fact, where the evidence is conflicting, we are not accustomed to set it out, but to state merely the conclusion which we reach.

One matter remains to be noticed. Mr. F. M. Davenport in his argument makes a statement of facts outside of the rec-

Maben v. Mahen.

2. PRACTICE
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ord, and claims that they impeach the judicial conduct of the district judge who tried the case.

We cannot recognize such statement as true, nor properly allow ourselves to be influenced in the least by it, as the counsel well knows. It follows that he has addressed to this court improper considerations, and our self respect, as well as due regard to the proper administration of justice, requires that we should say this, and express our disapproval.

The decree of the district court is

AFFIRMED.

MABEN V. MABEN.

- 1. Divorce: TEMPORARY ALIMONY: AMOUNT ALLOWED NOT EXCESSIVE.**
See opinion.

Appeal from Cerro Gordo Circuit Court.

FRIDAY, OCTOBER 23.

ACTION for a divorce. After the case was partly prepared for trial the plaintiff filed a petition for temporary alimony, setting out that she had already been obliged to incur the expense of \$52 in taking a deposition, and needed additional money to aid her in prosecuting her suit. She also showed that she and two small children were dependent upon her earnings for support, which were only \$40 per month. The court allowed, as temporary alimony, the sum of \$152, being the amount of expense already incurred in taking a deposition, and \$100 in addition. From the order making the allowance the defendant appeals.

Richard Wilber, for appellant.

Sherwin & Shermerhorn, for appellee.

The State v. Hopkins.

ADAMS, J.—The ground of resistance to the plaintiff's application is a want of ability. But it is not shown that the defendant is not in good health and capable of earning money. He appears to be actively engaged in business, and we must presume that he is capable of earning something. It appears, also, that he has contributed very little to the support of the children, and has left the burden of their support almost wholly upon the plaintiff. We think that, under the circumstances shown, the allowance is reasonable.

AFFIRMED.

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THE STATE V. HOPKINS.

1. **Criminal Law: SENTENCE ON SECOND CONVICTION AFTER APPEAL:** CODE, § 4545. The district court is not bound to inflict the same punishment on a second conviction as on the first one, after the first one has been reversed on appeal; and, in the absence of a contrary showing, it will be presumed that, in pronouncing the second sentence, the court took into consideration the imprisonment of the defendant under the first sentence, pending the appeal, as required by § 4545 of the Code.

Appeal from Story District Court.

FRIDAY, OCTOBER 23.

THE defendant was indicted, tried, and convicted of grand larceny. From the judgment against him he now appeals to this court.

J. L. Dana, for appellant.

A. J. Baker, Attorney-general, for the State.

BECK, CH. J.—I. The abstract upon which the cause is presented to us for decision shows that defendant was first convicted upon the indictment in September, 1883, and sentenced to the penitentiary for the term of two years; that

upon an appeal from that judgment it was reversed, but not until after defendant had been imprisoned thereon from about the day of his conviction to the reversal of the judgment in January, 1885, no *supersedeas* of the judgment having been had; and that in February, 1885, he was again tried, and again sentenced to the penitentiary for the term of two years, where he is now in imprisonment under the sentence.

II. The defendant now insists that the district court erred in failing to deduct the time he had served in prison from the two years of his second sentence. Upon the second trial and conviction the district court determined the term of imprisonment which justice required. The law did not require the court to adhere to the term fixed upon the first conviction. The evidence may have disclosed the fact to be that justice required an imprisonment for a longer term. While it is true that the district court ought to have considered the time defendant had been imprisoned upon the first conviction in determining the term of imprisonment upon the last, (see Code, § 4545,) it is not shown that this was not done; and we will presume that the court, acting rightly, did, in the second sentence, consider the term of defendant's prior imprisonment. An appellate court is always bound to exercise presumptions in favor of the judgments it reviews, until it is shown that the law and justice have been violated by such judgment.

AFFIRMED.

MCMILLEN V. BLATTNER ET AL.

1. **Constitution of Iowa: AMENDMENT PROHIBITING MANUFACTURE AND SALE OF INTOXICATING LIQUORS NOT LAWFULLY ADOPTED.**
Koehler v. Hill, 60 Iowa, 543, followed.

Appeal from Mahaska District Court.

FRIDAY, OCTOBER 23.

THIS action was commenced on the twenty-fourth day of July, 1884. A demurrer to the answer was overruled, and the plaintiff appeals.

Liston McMillen, pro se.

No appearance for appellees.

SEEVERS, J.—Appellant concedes in an able and exhaustive printed argument that the only question for determination is whether the amendment to the constitution which was ratified by the people at a special election held on the twenty-seventh day of June, 1882, was constitutionally adopted and became a part of the constitution of this state. This question was considered and determined in *Koehler v. Hill*, 60 Iowa, 543. A petition for a rehearing was filed and granted. Able arguments were made on rehearing by distinguished counsel, and after mature consideration a majority of the court adhered to the conclusion reached in the original opinion, that the amendment to the constitution had not been constitutionally adopted, and therefore did not become a part of the constitution. After again considering this question, we are now content to say that we are not disposed to overrule the case cited.

AFFIRMED.

GETTY & BORN V. TRAMEL ET AL.

1. **Mechanic's Lien on Wife's Property:** LUMBER BOUGHT BY HUSBAND ON HIS CREDIT AGAINST HER WILL. Where a husband, against his wife's protest, purchased lumber on his own credit, and used it to build an addition to a barn on the wife's land, *held* that a mechanic's lien did not attach to the land, nor to the improvement made with the lumber, for the price thereof.

Appeal from Jasper Circuit Court.

FRIDAY, OCTOBER 23.

ACTION to recover for lumber sold to the defendant Joseph M. Tramel, and to enforce a mechanic's lien against the property of the defendant Cynthia E. Tramel. The court rendered judgment against Joseph M. Tramel, but denied the plaintiffs a lien. They appeal.

Cragan Bros. and Cook & Clements, for appellants.

Winslow & Varnum, for appellees.

ADAMS, J.—The lumber was furnished for an addition to a barn upon a farm belonging to the defendant Cynthia E. Tramel. It was bought by her husband, the defendant Joseph M. Tramel, in his own name, and he gave his note for the same. He did not claim to act as his wife's agent, nor does there appear to have been any supposition on the part of the plaintiffs that the defendant Cynthia owned the land upon which the lumber was to be used. She, though confined to her house by sickness, had some knowledge that the lumber was being hauled, and used in the erection of an addition to the barn, but disapproved of it, and so expressed herself to her husband, believing that their circumstances were not such as to justify the improvement. We know of no rule by which a wife's premises can be charged with a lien for improvements erected thereon by an improvident hus-

The State v. Brown.

band against her protest. Possibly, if the lumber had been bought in her name, and she knew it, or had reason to suspect it, she should have expressly notified the plaintiffs that she repudiated the assumed agency. But it was not bought in her name. The husband bought it ostensibly for himself, as he had a right to do. The plaintiffs extended credit to him alone, and took his note, as was their right, whatever he might wish to do with the lumber, and we think their remedy must be confined to a personal judgment against him, as the court held.

It is claimed that they ought to have a lien at least against the addition, and have a right to go upon the premises and detach and remove it, but it appears to us otherwise. The lien could attach only upon the husband's interest. But the moment the improvement was made it became an integral part of the entire structure, the title to which was in the wife. He had seen fit to make it for her benefit, and the lumber which he had owned as a chattel he had transferred to her by the act by which he made it a part of her realty.

The plaintiffs rely upon *Conrad v. Starr*, 50 Iowa, 481, and *Clark v. Parker*, 58 Iowa, 509, but in our opinion the cases are not applicable.

The judgment of the circuit court must be

AFFIRMED.

THE STATE V. BROWN.

1. Criminal Law: ASSAULT WITH INTENT TO KILL: DEADLY WEAPON.

An instrument may or may not be a deadly weapon, depending on the manner of its use. In this case, where an assault was made with premeditation, and with a total disregard of consequences, with a stick three feet long, three inches wide and one inch thick, under the circumstances disclosed by the evidence, (see opinion,) *held* that the jury was warranted in finding the defendant guilty of an assault with intent to murder.

Appeal from Cass District Court.

FRIDAY, OCTOBER 23.

THE indictment charges that "the defendant and John Hall, with their hands and deadly weapons, to-wit, a certain piece of wood, the particular description of which is to the grand jury unknown, and with certain revolvers which were then and there loaded and charged with powder and ball, and held in the hands of the said Grant Brown and John Hall, unlawfully, * * * and with malice aforethought, and with intent to kill and murder one W. W. Eller, did then and there make an assault upon the person of the said Eller," etc. The defendants pleaded not guilty. Trial by jury, and, both being found guilty of an assault with intent to commit murder, judgment was rendered on the verdict. The defendant Brown appeals.

L. L. De Lano, for defendant.

A. J. Baker, Attorney-general, for the State.

SEEVERS, J.—The jury were warranted from the evidence in finding that several persons had assembled at a school-house for a lawful purpose, and that Eller, the person alleged to have been assaulted, was seated, quietly conversing with others, when he was approached by the defendant, who asked Eller if he had testified that he would not believe the defendant under oath. Upon Eller's replying that he had, the defendant struck him with a piece of wood, which was about three feet long, three inches wide and one inch thick. The jury were warranted in finding that the assault was premeditated, because of the defendant's having whittled the stick down at one end so as to give him a good hand-hold, and from a remark made while preparing the stick, immediately prior to the assault. The jury were also warranted in finding that in giving the blow the defendant used both hands. They were

The State v. Brown.

also warranted in finding that thereafter the defendant struck Eller again with the stick, and drew a revolver, and more than once threatened to shoot him. There is evidence tending to show that Eller, either just prior to being struck, or about that time, drew or attempted to draw a revolver; but the jury were warranted in finding that he did not do so until after he was struck, and that he made no attempt or threat to shoot.

It is urged that the verdict is not sustained by the evidence, but we are satisfied that the defendant made a wicked assault on Eller with the stick; that he did so premeditatedly, and that he on more than one occasion drew his revolver and threatened to shoot Eller. The only possible doubt there can be is as to the intent with which the assault was made. Upon a careful consideration of the evidence we do not think we should interfere with the finding of the jury in this respect. The weapons used, the premeditation, and all the circumstances attending the assault, lead us to the conclusion that the assault was made with a deadly purpose. It clearly was made recklessly and with a total disregard of consequences. It was unprovoked and wicked. The revolvers were, of course, deadly weapons; but it is said the stick was not; but we cannot so say as a matter of law. This, we think, was a question for the jury. An instrument may or may not be a deadly weapon, depending on the manner in which it is used. It is probable that a riding-whip should not be so regarded. A base-ball bat, if viciously used, probably should be. We think death might be caused by the use of the stick with which the assault was made in this instance. The jury might well so conclude from all the circumstances in the case. We cannot interfere with the verdict. The instructions are criticised mainly on the ground that they are not sufficiently certain and definite as to whether the stick should or could be regarded as a deadly weapon. We have each of us separately read the instructions, and have separately reached the conclusion that they are not erroneous

Robinson v. The Chicago, Rock Island & Pacific R'y Co.

in this or any other respect. We deem it unnecessary to set them out or state the reasons upon which our conclusions are based.

AFFIRMED.

ROBINSON V. THE CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.

1. **Railroads: CATTLE-GUARDS: WHERE THEY MUST BE MAINTAINED:** CODE, § 1288. Under the provisions of Code § 1288, a railroad company must maintain a cattle-guard wherever its road enters or leaves "fenced land," whether the fenced land be the land of another or its own right of way.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 23.

ACTION to recover for personal injuries sustained by plaintiff while in the discharge of his duty as an employe of defendant, caused, as he alleges, by defendant's negligence. There was judgment upon a verdict for plaintiff. Defendant appeals.

Wright, Cummins & Wright, for appellant.

D. O. Finch and *D. Donovan*, for appellee.

BECK, CH. J.—I. The plaintiff was in the employment of defendant as a brakeman upon a freight train, and was required, when the train reached Van Meter, a station upon defendant's railroad, to uncouple a car so that it could be put upon a side track. In the discharge of this duty he went between the cars for the purpose of uncoupling them, and, while doing so, moved with the train until he stepped into a cattle-guard, when one of his legs was caught by a wheel of a car, causing injuries to it which rendered amputation necessary. He had no knowledge of the fact that there was a

Robinson v. The Chicago, Rock Island & Pacific R'y Co.

cattle-guard at the place, and the accident occurred in the night-time. The plaintiff charges that defendant was negligent in keeping a cattle-guard at the place, for the reason that it was not required by the necessities of the business of the defendant, by the wants of the public, or by the fact that the land adjacent thereto was inclosed.

II. The circuit court gave to the jury the following instruction:

"(2) The first issue for you to decide is whether the defendant was negligent in keeping the cattle-guard at the place it was kept. To do this you must understand what duty it owed to the plaintiff as an employe, and what to the public, in the location of its cattle-guards. The defendant, in receiving the plaintiff into its employment, became bound to the exercise of reasonable care, and reasonable care only, in locating its cattle-guards so as to not unnecessarily expose him to danger while in the performance of his duty. As to the duty and privilege of the defendant to construct cattle-guards where its road is not fenced, the Code provides that corporations constructing or operating a railway shall make proper cattle guards where the same enters or leaves any improved or fenced land, and at highway crossings, and that any company neglecting or failing to do so shall be liable for all damages sustained by reason of such neglect. This, you observe, only requires cattle-guards to be constructed where the road enters or leaves improved or fenced land. The object of this provision is to preserve or complete the inclosure of improved or fenced lands through which the road runs. If the land is not improved or fenced in common on both sides of the railway, then a cattle-guard is not required at the point of entering or leaving the land, if the track is unfenced, as in such case it would not serve to inclose either the land or the track; but if the land is improved or fenced in common on both sides, and the track is not fenced, then the railway company is bound to place a cattle-guard at the point of entering and leaving such land, or to pay all damages sustained by reason

Robinson v. The Chicago, Rock Island & Pacific R'y Co.

of the want of such cattle-guard. As the undisputed evidence is that the land outside of defendant's right of way was not improved or fenced on the south side of the track, at and west of the cattle-guard in question, the defendant was not required to place a cattle-guard at that point under this provision of the law as to the duty and privilege of defendant to fence its track. It is also provided that, if a railroad company fails to fence its road against live stock running at large, it is liable for all stock killed or injured by reason of the want of such fence, unless it be at a place, such as station grounds, where the public interest and convenience, or the business of the road, requires that it be open and unfenced."

This instruction is by no means clear, and is plainly conflicting in its terms. It announces the rule that the railroad is bound to construct cattle guards when the adjacent land is improved or fenced in common on both sides, and the track is not fenced, and it holds that, as the evidence shows the land on one side of the railroad outside of the right of way was not fenced, the defendant was not required to construct a cattle-guard. The instruction is plainly erroneous. Code, § 1288, provides that "every corporation constructing or operating a railway shall make proper cattle-guards where the same enters or leaves any improved or fenced land." The provision is not limited to lands outside of the right of way of railroads which are fenced for cultivation or pasture. It applies to the case where the corporation fences its right of way. When that is done there is "fenced land," and, upon entering or leaving such fenced right of way, the law requires a cattle-guard. The fencing of the railroad would afford no protection to live-stock running at large and not within inclosures, unless cattle-guards were constructed at the place where the fences end or are not continuous. Indeed, fencing without cattle-guards would imperil the live-stock found at such places. There being no cattle-guards, cattle and horses would be invited upon the right of way, and would thus be exposed to dangers greater than if no fences existed.

Enfield v. Blyler et al.

Other questions in the case need not be considered, as the judgment, for the error in the foregoing instruction, must be
REVERSED.

ENFIELD V. BLYLER ET AL.

1. **Constable: EXECUTION SALE WITHOUT NOTICE: ACTION FOR DAMAGES: CODE, § 3081.** The penalty provided by § 3081 of the Code, for selling property on execution without giving the notice prescribed by § 3080, cannot be recovered where no actual damage has accrued. (*Coffey v. Wilson*, 65 Iowa, 270.) And where action was begun for damages and penalty, but the claim for damages was withdrawn, a judgment for the penalty was without warrant, and must be reversed.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 23.

THIS is an action to recover damages and the statutory penalty upon the official bond of a constable for selling certain personal property of the plaintiff on execution without giving the notice of sale required by law. There was a trial to the court without a jury, and a judgment was rendered for the plaintiff. Defendants appeal.

L. G. Bannister, for appellants.

D. O. Finch and *D. Donovan*, for appellee.

ROTHROCK, J.—It is provided by section 3081 of the Code that an officer selling property on execution without the notice prescribed by section 3080 “shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party. * * *”

It appears from the finding of facts in this case “that the plaintiff withdrew on the trial all claim for damages, and only sought to recover the statutory penalty of one hun-

Eshelman v. The Chicago, Rock Island & Pacific R'y Co.

dred dollars." The judgment rendered was for the forfeiture only. In the case of *Coffey v. Wilson*, 65 Iowa, 270, it was held by this court that the penalty of \$100 could not be recovered where there was no actual damages suffered by the defendant in execution by reason of the failure of the officer to give notice of the sale. That case seems to be decisive of the case at bar. It is true that in this case the plaintiff claimed actual damages in his petition. But he withdrew that claim on the trial. The court was therefore authorized in finding that he had sustained no actual damages, the same as if he had made no such claim in his petition. It is not a case where the law will presume damages in the absence of any claim therefor.

REVERSED.

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ESHELMAN V. THE CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.

1. **Jury: NOT LESS THAN TWELVE: CODE. § 2793: CONSTITUTIONALITY.**
The jury contemplated by the constitution is the jury recognized by the common law, which is constituted of twelve men. It follows that a verdict by a jury of less than twelve men is of no effect unless the objection is waived, and that § 2793 of the Code, authorizing a verdict from ten or eleven jurors, when the jury has been reduced to that number by sickness, is in conflict with the constitution.
2. —: **SUBMISSION OF CAUSE TO ELEVEN MEN: OBJECTION NOT WAIVED.** Where one of the jurors was sick and absent, and defendant objected to proceeding with eleven jurors, it did not waive the objection by moving for judgment upon a special verdict returned by the eleven.
3. **Practice in Supreme Court: INSUFFICIENCY OF PETITION: OBJECTION TOO LATE.** An objection that the petition is not sufficient to sustain the verdict cannot be urged for the first time in this court.

Appeal from Jefferson Circuit Court.

FRIDAY, OCTOBER 23.

ACTION to recover for certain cattle killed by a train upon

Eshelman v. The Chicago, Rock Island & Pacific R'y Co.

defendant's railroad, at a place where the right to fence existed. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Wilson & Hinkle, for appellant.

J. B. McCoy and *R. F. Ratcliff*, for appellee.

BECK, CH. J.—I. The record shows that after the evidence and arguments of counsel were submitted to the jury upon Saturday, they were permitted to separate until Monday, when it appeared that one of them was sick and unable to attend court. Thereupon the sick juror was discharged, and the court, against defendant's objection, submitted the cause to the remaining eleven jurors. This is now complained of as error.

II. The jury contemplated by the constitution is the jury recognized by the common law, which is constituted of twelve persons. In securing the right of trial by jury, that instrument gives no authority to the legislature to provide for a less number than twelve jurors. 1. JURY: not less than twelve: Code, § 2793: constitutionality. It was ruled by this court twenty-seven years ago that a jury consisted of twelve persons, and that a verdict of a less number was of no effect unless the objection was waived. *Cowles v. Buckman*, 6 Iowa, 161. The doctrine of this case has never been brought in question since its decision. It follows that Code, § 2793, authorizing a verdict from ten or eleven jurors, when the jury has been reduced to that number by sickness, is in conflict with the constitution.

III. It is insisted by plaintiff that this objection was waived by defendant by a motion for judgment upon a special verdict. We think differently. The defendant objected to the jury at the proper time because of the absence of one juror. But the objection was overruled. It was not then required to abandon the defense of the case, but was authorized to contest it even before an unlawful jury, and to insist upon all objec- 2. —: submission of cause to eleven men: objection not waived.

tions arising upon the trial. It was authorized to ask a verdict at the hands of such jury, and a judgment thereon, and this was all it did by the motion for judgment upon the special findings.

IV. The defendant insists that the petition is defective, and not sufficient to support the verdict, in that it fails to aver that the cattle killed went upon the railroad track and were killed by reason of defendant's failure to fence the road at a point where it had the right to construct fences. But this objection was not raised upon demurrer, and it is not clear that it was raised in the motion in arrest of judgment. We do not, therefore, pass upon it. Other objections are not considered, for the reason that the alleged errors cannot again occur in another trial.

For the error in submitting the case for verdict to eleven jurors, the judgment of the circuit court is

REVERSED.

HUFF V. FARWELL ET AL.

1. **Mortgage on Land: SUBSEQUENT SALE OF THE LAND IN PARCELS: ORDER OF LIABILITY.** Where land encumbered by mortgage is conveyed in parcels to different persons at different times, the parcels are chargeable with the mortgage debt *pro rata*, and not in the inverse order of their alienation.
2. —: **RELEASE OF LAND BY HOLDER, BUT NOT OF RECORD: PURCHASER OF MORTGAGE WITH NOTICE BOUND BY RELEASE: LIABILITY OF RELEASOR TO RELEASEE.** Where the holder of a mortgage on land, for a valuable consideration paid by the owner of a portion of the land, agrees to release such portion from the operation of the mortgage, but such release is not made of record, a purchaser of the mortgage from such holder, with notice of such agreement, is bound thereby, and cannot afterwards enforce the mortgage against such portion of the land. And where such releasee was made a party to an action of foreclosure, brought by a purchaser of the mortgage from the releasor with notice of the release, and the releasee, instead of pleading his defense against the

67	298
90	456
67	298
104	604
67	298
137	137

Huff v. Farwell et al.

plaintiff, set up a cross-bill for damages against his co-defendant, the releasor, on account of his failure to enter the release of record, *held* that a judgment on such cross-bill could not be sustained, because the failure to enter the release of record did not, under the circumstances, work any damage to the releasee.

3. **Principal and Agent:** PRINCIPAL BOUND BY AGENT'S KNOWLEDGE: EXAMPLE. Where plaintiff purchased, through his agent, a note and mortgage, and the agent at the time knew that the holder of the mortgage had, for a valuable consideration, agreed to release a portion of the mortgaged premises from the operation of the mortgage, *held* that the principal was bound by his agent's knowledge, and took the mortgage subject to such agreement.
4. **Practice in Supreme Court:** TRIAL DE NOVO: EVIDENCE: ABSTRACT. It is not usually necessary or desirable that an abstract contain in fact all the evidence, in order to a trial *de novo*, but only such as is necessary to a proper understanding of the facts of the case; and when the abstract purports to contain all the evidence, it will be presumed to be true for the purposes of the case, except so far as additional evidence is set out by the appellee.

Appeal from Bremer Circuit Court.

FRIDAY, OCTOBER 23.

ACTION to foreclose a mortgage executed to the plaintiff by the defendant Farwell. The defendants Potter, Olds and Curtis were made parties as claiming to have an interest in the mortgaged property, acquired subsequently to the mortgage. The defendant Potter filed a cross-petition against Curtis, averring that Potter was the owner of the south half of the premises in question by purchase subsequent to the mortgage; that at one time Curtis was the owner of the mortgage by purchase from the plaintiff; that Curtis for a valuable consideration agreed with him (Potter) to release his half of the property; that he failed to do it, and sold and delivered the mortgage back to the plaintiff, and by breach of his agreement he will sustain damages in whatever he may be obliged to pay to discharge his property, and he prayed that he might have judgment against Curtis for such amount. The court rendered a decree of foreclosure in favor of the

Huff v. Farwell et al.

plaintiff, charging one-half of the mortgage debt as a lien upon the north half of the premises owned by the defendant Olds, and the other half of the debt upon the south half owned by the defendant Potter, and rendering judgment in favor of Potter against Curtis as prayed in Potter's cross-petition. The defendant Curtis appeals.

E. L. Smalley and Horace Boies, for appellants.

H. H. Gray and Gibson & Dawson, for appellee.

ADAMS, J.—The undisputed facts appear to be that the defendant Farwell was the owner, at one time, of lots 2 and 3, in fractional block 6, in the city of Waverly; that while he was such owner he undertook to execute a mortgage upon them to the plaintiff, and gave the mortgage now sought to be foreclosed; that by mistake the property was not well described, and there is some doubt as to whether the description is sufficient to cover the property; that after the execution of the mortgage he sold the south half to one Francis Williams, and he, Williams, sold it to one Miss Sophia Williams, and she sold it to the defendant Potter, and all had knowledge of the mortgage, and the intention of Farwell to make the same cover the property in question; that after Farwell sold the south half he sold the north half to one Mrs. Billings; that at the time Potter bought he paid the full purchase price, notwithstanding he had knowledge of the existence of the mortgage, relying, probably, in part upon the covenant of warranty in his deeds from Miss Williams, and in part upon another matter out of which this controversy has arisen. He seems to have conceived the idea, for some reason, that if he could acquire the plaintiff's mortgage he could enforce it wholly against the north half, owned by Mrs. Billings, and he entered into negotiations for such purpose. The defendant Curtis was, at the same time, a judgment creditor of Farwell, and he seems to have conceived the idea that if he could acquire the mortgage he could aid himself in some way

in the collection of his judgment, and he entered into negotiations for the purchase of the mortgage. Potter claims that he himself succeeded in effecting a purchase of it, though the mortgage was not delivered to him, and that he relinquished his right to Curtis, who, in consideration thereof, was to release the south half. It is undisputed that Curtis agreed, at least with the plaintiff's agent, that, if he was allowed to acquire the mortgage, and did acquire it, he would release to Potter the south half, and look to the north half alone, owned by Mrs. Billings. Upon what ground either he or Potter arrived at the conclusion that the whole mortgage could be enforced against Mrs. Billings' half does not appear. It is true that the south half was sold first, and in some states it has been held that, where mortgaged property is sold in parcels at different times to different persons, the

1. MORTGAGE
on land: sub-
sequent sale
of the land in
parcels: order
of liability.

parcels, upon foreclosure, are liable in the inverse order of alienation. But such has never been the rule in this state. On the other hand, it is well settled that the parcels are chargeable *pro rata*. The earliest decision upon the point is *Bates v. Ruddick*, 2 Iowa, 425. Potter seems to have based his idea upon something which he claims that Mrs. Billings' husband said to him about it. But there is nothing which he could say that would bind Mrs. Billings, so far as the evidence shows.

But it is not important to inquire how Potter or Curtis came to make such mistake. Curtis soon discovered that Mrs. Billings' half was not primarily liable for the whole debt, and that he could not acquire the mortgage and release the south half without discharging a *pro rata* part of the mortgage debt, so far as the enforcement of the debt was concerned, against the mortgaged property. He had gone so far as to take an assignment of the mortgage and give his check therefor, but he says he had not actually bought the mortgage, but was to have an opportunity to see what he could do with it, and was to be allowed to return it and

Huff v. Farwell et al.

receive back his check, if he found that he could not use the mortgage in the way he had planned; and he did return it and receive back his check. As to whether the title to the mortgage actually passed to Curtis, the evidence is such as to leave our minds in some doubt. But we do not find it necessary to determine such question. If the title to the mortgage never actually passed to Curtis, he never had any power to release the mortgage, and in such case it is not claimed that he would be liable for his failure to release it. On the other hand, if the title did pass, and Curtis, for a

valuable consideration received from Potter, had agreed to release Potter's land, then there was, as between Potter and Curtis, an equitable release, and the land, as between them, stood virtually discharged. Equity considers as done that which ought to be done. It would not be claimed for a moment by Potter, if that took place which he claims did take place, that Curtis, if he had retained the mortgage and had sought to foreclose the same as against Potter's half, could have had a decree to that effect. A release of record would have been of no importance. That, at best, would have been mere evidence of a discharge which in equity had already taken place. Now, when the plaintiff bought back the mortgage and the mortgage debt, if he did so, he could not properly claim to have the lien restored unless he had an equity superior to Potter's. But he could not have a superior equity if he had knowledge of Potter's equity. If he knew that Potter's land had for a valuable consideration been released by Curtis, while owner of the mortgage, he bought the mortgage with such land released.

As to the plaintiff's knowledge, it is sufficient to say that it is undisputed that his agent, who sold the mortgage to Curtis, if it was sold, and bought it back, if it was bought back, had been the negotiator between Curtis and Potter, and knew everything that had been done in the premises. His knowl-

2. —: release of land by holder, but not of record: purchaser of mortgage with notice bound by release: liability of releasor to releasee.

3. PRINCIPAL and agent: principal bound by: agent's knowledge: example.

Huff v. Farwell et al.

edge, under the circumstances shown, was the plaintiff's knowledge. Potter, then, upon his own theory, had a complete defense to the mortgage, and might have set it up by pleading as an answer to the plaintiff what he pleaded in a cross-petition against Curtis, and ended this whole trouble. His whole claim for damages against Curtis is based upon the fact that Curtis failed to make an entry of record showing the agreed release. But, under his theory of the evidence, such release of record, if it had been made, would not have added anything to the strength of the defense which he had and might have made. His defense being perfect without the release of record, he was not damaged because Curtis had failed to make it.

Potter contends that the case is not triable *de novo* because the abstract does not contain all the evidence. But the abstract purports to contain all the evidence; and, where such is the case, we assume that it is true, except so far as additional evidence is set out by the appellee. It is not usually necessary or desirable that an abstract should in fact contain all the evidence, for reasons which must be apparent to every lawyer. It is possible, of course, that, under our rule, an improper burden might be imposed upon the appellee, but practically this seldom happens, and it would be impossible to adopt the rule contended for without throwing upon this court an amount of work which it could not perform. In rendering judgment against Curtis, we think that the court erred.

4. PRACTICE
in supreme
court: trial
de novo: evi-
dence: ab-
stract.

REVERSED.

Lea v. Woods et al.

LEA V. WOODS ET AL.

SAME V. STEVENS ET AL.

1. **Dower: HOW AFFECTED BY DECREE AGAINST HUSBAND ALONE.**

Wherever the wife's interest in real estate has once attached, and the question is as to whether it has been divested or otherwise affected, a party asking affirmative relief on the theory that it has should make her a party to the action brought to determine such question; but where a judgment or decree against the husband alone shows that he never had any interest in which his wife was dowable, she is bound by such decree, though not a party to the action. It is accordingly *held* that these actions for the admeasurement of dower were barred by a former adjudication against plaintiff's husband, in which it was determined that his only interest in the land was that of a mortgagee, though he held the legal title to it.

Appeal from Van Buren Circuit Court.

FRIDAY, OCTOBER 23.

THESE actions are submitted together as involving substantially the same question of law. They are actions in equity for admeasurement of dower. The plaintiff has died since the commencement of the actions, and her administrator has been substituted. At the time she commenced the actions she was the widow of Claiborne Lea, who died in 1871. In 1838 he derived title by patent from the United States to a quarter section of land in Van Buren county. The defendant Woods now claims to own the south half, and the defendant Stevens the north half. In 1850, Claiborne Lea, in an action brought against him by one Kaster, became divested of the title, and the title was vested in Kaster. The defendants claim under Kaster. The plaintiff, though the wife of Claiborne from a time prior to the commencement of Kaster's action, was not made a party. The court held, nevertheless, that she was barred by the decree, and dismissed her petition. She appeals.

Sloan, Work & Brown and *Lea, Wherry & Walker*, for appellant.

Charles Baldwin, Stiles & Beaman and *Johnson & Topping*, for appellee.

ADAMS, J.—In the action brought by Kaster against Lea, the court found and decreed that the defendant Lea took the title merely as mortgagee; that Kaster was, in equity, the owner of the land, and was entitled to redeem. If the fact was as the court found and decreed, Claiborne Lea never had any interest in the land in which the plaintiff was dowable, or in which she has become entitled to a distributive share. In the case at bar, no evidence of such fact was introduced, except the decree, and the question presented is as to whether the plaintiff, not having been made a party to Kaster's action, was so affected by the decree that it was properly admissible as evidence against her. Wherever the wife's interest has once attached, and the question is as to whether it has been divested or otherwise affected, a party asking affirmative relief on the theory that it has should make her a party to the action brought to determine such question. But the case, we think, is materially different where a judgment or decree against the husband shows that he never had any interest in which his wife could have dower or a distributive share. The principle involved in such case is not materially different from that in many others involving the question of title. Take the case of an ordinary action to quiet title. If the decree is based upon a finding that the unsuccessful party never had a beneficial interest in the property, the wife of such party, whether he be plaintiff or defendant, would be bound by the decree. Again, as a further illustration, suppose that Kaster, in the action brought by him, had failed, either for want of evidence or otherwise, no one would claim that his wife, if he had one, would not have been bound by a decision on the merits, regardless of its correctness. It is

Lea v. Woods et al.

true, her case would differ from the plaintiff's in this, that the plaintiff's husband held the legal title; but that was only *prima facie* evidence that he had an interest in which his wife was dowable. The point we are endeavoring to make is that a wife may be bound by an adjudication against her husband to which she is not a party, as would appear from this very case, if the decision had been against Kaster under the circumstances supposed. Now, where a wife becomes bound by a judgment or decree, it matters not what evidence there may be for her.

One or two minor considerations remain to be noticed. Kaster had taken Lea's bond for a deed. The bond provided that Lea, upon being paid, should convey by deed of general warranty, and shows that he was a seller and not a mortgagee. It may be conceded that this would be a circumstance tending to so show; but it is one which addressed itself exclusively to the court which was called upon to adjudicate the question of Lea's relation to the land. Whether that adjudication was right or wrong, it is not subject to our review.

The decree itself, however, followed the bond, and provided that Lea should convey with covenants of general warranty. It is said that this shows that the court regarded Lea as a seller and not a mortgagee. But, looking at the decree as a whole, it appears to us otherwise. The language of decree is: "The court finds that the rights of said Kaster are those of a mortgagor, and the rights of said Lea are those of a mortgagee." The language is too clear and explicit to leave any room for doubt. In our opinion the judgment of the court below must be

AFFIRMED.

WALKER V. DECATUR COUNTY.

1. **County: BRIDGE OUT OF REPAIR: INJURY TO TRAVELER: EVIDENCE OF OTHER SAFE ROUTE.** In an action for an injury sustained in crossing an unsafe county bridge, it was error to exclude evidence offered by the county to show that there was another equally convenient and perfectly safe route by which plaintiff might have reached his destination. *Parkhill v. Town of Brighton*, 61 Iowa, 103, followed.
2. ———: ———: ———: **CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** In such case it was error to instruct the jury that if there was another road which was safe and convenient, and the plaintiff knew that the bridge in question was unsafe, then plaintiff was, as a matter of law, guilty of contributory negligence in going over the bridge. The question of contributory negligence under the circumstances was for the jury to determine. See authorities cited in opinion.

Appeal from Clarke District Court.

FRIDAY, OCTOBER 23.

ACTION to recover damages because of an injury received by the plaintiff, caused by a defective county bridge. Trial by jury, and judgment for plaintiff. The defendant appeals.

Bullock & Hoffman and *Wright, Cummins & Wright*, for appellant.

E. W. Curry, Samuel Forney, McIntire Bros. and *Phillips & Day*, for appellee.

SEEVERS, J.—I. The plaintiff was injured by stepping into a hole in the bridge, which was out of repair, and the plaintiff so knew prior to the day when he attempted to cross it. The bridge had been so out of repair for some time. On the morning of the day of the accident, the plaintiff, with others, undertook to drive some hogs to Leon, the county seat, over the bridge, and the plaintiff was in advance of the hogs scattering straw over it at the time of the accident.

The defendant offered to prove on the trial "that plaintiff in this case could have reached his destination, being the

67	307
79	206
87	307
88	619
67	307
90	35
90	189
67	307
96	393
96	680
67	307
103	59
67	307
107	604
67	307
110	258
110	260
67	307
1125	631

Walker v. Decatur County.

1. **COUNTRY:** depot at Leon, Iowa, by going a different route,
bridge out of over a good road and across a good bridge, at
repair: injury least a half a mile nearer than he could have
to traveler: reached it by the road he did travel upon." An
evidence of
other safe
route.

objection to this evidence that it was immaterial was sustained, and in so ruling appellant insists that the court erred. Counsel for the appellee insist that the ruling is right, because there is no evidence which tends to show that the plaintiff's destination was the depot in Leon. The offer assumes that the depot was his destination. Construing the offer fairly, it amounted to this: Upon the supposition that the plaintiff's destination was the depot in Leon, we offer to prove, etc. Now, the objection was that the evidence offered was immaterial. In sustaining it we think the court must have held that the evidence was immaterial upon the supposition or basis of the offer. It is conceded that the plaintiff's destination was Leon, but it was material, because of the location of the depot, that his destination should be at that particular place in the town. We, however, think there was some evidence that the plaintiff's destination was the depot. The plaintiff testifies that "it would be from where he started with the hogs one-half mile to main road north, and from there to Leon depot from three and a half to four miles." Besides this, we think that the jury might have come to the conclusion from the evidence that the hogs were to be delivered to the depot for shipment. Taking into consideration the form of the question, the objection thereto, the ruling, what the court and parties must have thought and intended the decision meant, its bearing on the introduction of evidence, and the whole evidence, we think the evidence offered should have been admitted. *Parkhill v. Town of Brighton*, 61 Iowa, 103.

II. The defendant asked the court to instruct the jury as follows: "If you find that plaintiff knew of the dangerous and un-

2. —: —: safe condition of the bridge, and could have reached
 —: con- his destination as readily and conveniently by
 tributory neg- going upon a different road, the fact that he went
 ligence: ques-
 tion for jury.

upon this bridge of itself constitutes contributory negligence, and you should find for the defendant." This instruction was refused. The thought of the instruction is that if there was another road which was safe and convenient, and the plaintiff knew the bridge in question was unsafe, then the plaintiff was, as a matter of law, guilty of contributory negligence. The instruction goes much further than the one approved by this court in the *Parkhill Case*; for in that case the jury were required to find that it was imprudent for the plaintiff to go over a walk which he knew was dangerous, and in this will be found the vice of the instruction under consideration. The bridge in question was not barricaded; but from its location and situation the public were invited to pass over it. It is true that it was unsafe, and the time would come, and perhaps it had already come, when it would be imprudent for any person, in the exercise of reasonable discretion and prudence, to make the attempt to pass over it; but this was a question for the jury. The mere fact that it was unsafe would not of itself prevent a recovery. *Rice v. City of Des Moines*, 40 Iowa, 638; *Munger v. City of Marshalltown*, 59 Id., 763; *Ross v. City of Davenport*, 66 Id., 548; *Whitford v. Inhabitants of Southbridge*, 119 Mass., 564; *Humphreys v. Armstrong Co.*, 56 Pa. St., 204. It is possibly true that in none of the foregoing cases does it affirmatively appear that there was another safe and convenient way. But it is obvious, we think, that this fact cannot change the rule; for, as the bridge in question was open for travel, the material inquiry was whether the plaintiff, in making the attempt to pass over it, acted with ordinary care and caution, having a prudent regard for his own safety. The court did not err in refusing the instruction under consideration.

In view of a retrial, we deem it proper to say that instruction numbered 10½ given by the court is erroneous, because it allows a recovery without reference to the question of the defendant's negligence. It may be that it was not sufficiently excepted to, as the plaintiff contends: and possibly, when

The Beaver Valley Bank v. Cousins & Spooner et al.

all the instructions are considered together, it cannot be said to be prejudicial. It would be improper to consider the question whether the verdict is excessive, and we are unable to discover any error in the record except as above stated.

REVERSED.

THE BEAVER VALLEY BANK V. COUSINS & SPOONER ET AL.

1. **Execution: GARNISHMENT OF JUDGMENT IN FAVOR OF EXECUTION DEBTOR, BUT IN FACT BELONGING TO ANOTHER.** A judgment appearing of record in favor of the execution defendant, but which in fact belongs to another, cannot, by the garnishment process, be subjected to the execution, where it appears that the execution plaintiff has been in no way prejudiced by the fact that the judgment appeared to belong to his debtor. In such cases the law will look to the very rights of the parties, and will not suffer an execution to be satisfied out of another's property.

Appeal from Butler District Court.

FRIDAY, OCTOBER 23.

ACTION at law upon a bond executed to a sheriff to indemnify him against any claimant of money in his hands, collected upon execution, against damages which he might sustain by reason of the unlawful payment thereof to defendants, the principals in the bond. There was a trial to the court without a jury, and a judgment for plaintiff, a claimant of the money. Defendants appeal.

H. C. Hemenway, for appellants.

O. B. Courtright, for appellee.

BECK, CH. J.—I. The undisputed facts in the case are as follows: (1) Plaintiff recovered a judgment against F. W. Rice, who subsequently recovered a judgment against one Benson. (2) Benson being garnished by plaintiff as the

debtor of F. W. Rice, and answering that he was indebted to him upon the judgment, another judgment was rendered against him in its favor as garnishee, upon which an execution was issued and delivered to the sheriff. (3) Benson paid the money to the sheriff, who, at the time, held an execution upon the judgment against F. W. Rice, in favor of plaintiff. (4) The debt upon which the judgment in favor of F. W. Rice was rendered against Benson was, in fact, the property of Levi Rice, for whom F. W. Rice had acted as agent in the transaction out of which the debt originated, but for convenience, or other lawful purpose, the note was made payable to F. W. Rice. (5) The judgment rendered upon this note against Benson, under which defendants Cousins & Spooner claim the money in question, was assigned to them in payment of property bought for and used by Levi Rice; he receiving the sole benefit therefrom. (6) Neither Cousins & Spooner, nor Levi Rice, nor F. W. Rice, had knowledge of the garnishment of Benson in the proceedings instituted by plaintiff. (7) After the money in question came into the hands of the sheriff, both plaintiff and Cousins & Spooner claimed it. And the sheriff, being doubtful as to whom it should be paid, required the indemnifying bond of defendants, and upon its execution paid the money to them. Upon this bond the action was brought.

II. We are of the opinion that the district court erred in holding that plaintiff is entitled to recover upon the bond. The property in the note executed by Benson to F. W. Rice was in Levi Rice, and the same is true of the judgment rendered thereon. It is true that F. W. held the note and judgment in his own name, but he so held them as an agent or trustee of Levi, who could at any time have enforced their transfer to him, or the payment of the proceeds thereof. He was the real owner of the note and judgment, and of the money paid thereon. The judgment, being the property of Levi, was assigned to Cousins & Spooner to pay a debt he owed them. The plaintiff, being a creditor of F. W. Rice,

cannot enforce its judgment against property not belonging to him. The law will consider the very rights of the parties, inquire who is the real owner of the money in question, and award it accordingly. It will not appropriate the money to the payment of the debt of F. W. Rice, who did not hold the title thereto. There is no fraud or misrepresentation in the case which gives plaintiff any claim to the money. It was not induced to part with any right by a knowledge of the fact that the note and mortgage were in the name of F. W. Rice. It is not shown that plaintiff gave him credit for the reason that he held the note and judgment in his own name. Plaintiff stands simply in the position of one attempting to collect the judgment in his favor from property not owned by his debtor. It has lost nothing by reason of the fact that its debtor held the note and judgment, and is in no worse position than it would have been in had the real ownership of the note or mortgage appeared upon its face. These considerations lead us to the conclusion that the sheriff rightly paid the money to defendants, and that there can be no recovery upon the indemnifying bond upon which this suit is brought.

Questions in regard to the validity of the bond, based upon the fact that it is not authorized by the statute, need not be discussed and decided.

The judgment of the court below is reversed, and the cause will be remanded for a judgment in accord with this opinion.

REVERSED.

ARNOLD V. HAWLEY.

1. **Action to Cancel Void Judgment: IN WHAT COURT BROUGHT: JURISDICTION.** Where a judgment is absolutely void, because no notice of the action was served on the defendant, an original action in chancery to cancel the judgment may be maintained in any court having jurisdiction of such matters, and the power to grant relief is not limited to the court in which the judgment was rendered.
2. —: **NECESSITY OF NEGATING INDEBTEDNESS.** If a judgment which is void for want of jurisdiction of the judgment defendant is to be regarded as *prima facie* evidence of indebtedness, (which is doubted,) and if, consequently, it is necessary to deny the existence of any indebtedness upon the cause of action on which the judgment was rendered, in order to state a good cause of action in equity for the cancellation of the judgment, then the petition in this case (see opinion) sufficiently denied such indebtedness, and the demurrer thereto, which admitted the allegations thereof, was properly overruled.

Appeal from Webster District Court.

FRIDAY, OCTOBER 23.

ONE Schofield obtained a judgment, in a law action against the plaintiff, which is the property of the defendant. This is an action in equity to set aside and cancel such judgment. A demurrer to the petition was overruled, and the defendant appeals.

Theo. Hawley, pro se.

J. F. Duncombe, for appellee.

SEEVERS, J.—I. It is alleged in the petition that no notice of the pendency of the action in which the judgment was rendered was ever served on the plaintiff, and that the court had no jurisdiction or power to render it, but that the same constitutes an apparent lien on the plaintiff's property, and therefore he asked to have it set aside.

1. ACTION to
cancel void
judgment: in
what court
brought:
jurisdiction.

67	313
78	678
67	313
80	732
67	313
80	94
67	313
97	698
101	485
67	313
114	128
67	313
115	626
115	627
115	628
115	629
115	631
67	313
119	745
67	313
122	443
67	313
1134	235
67	313
1144	669
1144	670

There was a demurrer to the petition on two grounds; the first being that the court had no jurisdiction or power to grant the relief asked. This is based on the thought that, as the judgment was rendered in the circuit court, the plaintiff's remedy is confined to that court. Both the district and circuit courts are courts of general jurisdiction, and, if the judgment in question was voidable only, we may concede that the plaintiff, in order to have it set aside, should have proceeded in the court in which it was rendered. But the demurrer admits the allegations of the petition which are well pleaded to be true. This being so, the judgment in question is absolutely void, and yet is an apparent lien on the plaintiff's property. The plaintiff, therefore, we think, may proceed in any court having equitable jurisdiction, and have such judgment set aside.

The judgment was rendered in June, 1881, and the plaintiff obtained knowledge thereof in December, 1883. The time within which the plaintiff might proceed under chapter 1 of title 19 of the Code in the circuit court, in the manner therein provided, had expired when the plaintiff first obtained knowledge of such judgment. Code, §§ 3156, 3157. It is said that an action is regarded as still pending, although judgment has been recovered therein, as long as such judgment remains unsatisfied, and that therefore the relief asked should have been applied for in the court in which the judgment was rendered. *Wegman v. Childs*, 41 N. Y., 159; *Mann v. Blount*, 65 N. C., 99. This rule, which for the purposes of this case may be conceded, applies where there is a valid judgment, and an order is asked in aid of the enforcement of the judgment, or for the purpose of granting relief against it to which the defendant may be entitled. But it has no application, we think, to a case where the judgment is in fact void, but yet is an apparent lien. *Gilman v. Donovan*, 59 Iowa, 76, has no application to the case at bar. A new trial was sought in that case by petition in the court where the judgment was obtained, and it was held that

 Arnold v. Hawley.

a change of the place of trial in such case could not be had. This proceeding cannot be classed as a bill of review, as counsel claim, but it is an original action to set aside or cancel a judgment at law. A bill of review under the old practice could only be filed to correct errors in a decree in equity, and, of course, it should be brought in the court in which the decree was entered. The first ground of demurrer was therefore properly overruled.

II. The second ground of demurrer is that the facts stated in the petition do not entitle the plaintiff to the relief demanded, and the point made is that it is not stated in the petition that the plaintiff is not indebted on the cause of action stated in the petition on which the judgment was rendered, or that he has any defense thereto. In support of this proposition several authorities are cited, among which are *Dryden v. Wyllis*, 51 Iowa, 534; *Gilman v. Donovan*, 53 Id., 362. In these cases the judgment was voidable only, and this is true as to *Coon v. Jones*, 10 Iowa, 131, in which case the service of notice was insufficient; that is, defective merely. To the same effect is *Taggart v. Wood*, 20 Iowa, 236. In *Parsons v. Nutting*, 45 Iowa, 404, there was an appearance by an attorney who possibly had no authority to appear, but the existence of the indebtedness was admitted, and the judgment was said to be oppressive only for the reason that an amount of costs had been made and taxed to the plaintiff which were wholly unnecessary, and it was held that he should have tendered or offered to pay the amount admitted to be due.

But, as we have said, the judgment in this case is absolutely void, and our attention has not been called to any adjudged case which holds that before a party can obtain relief in a court of equity against such a judgment he must deny and show that he is not indebted to the party obtaining the judgment. The effect of such a rule would be that a void judgment is *prima facie* evidence of indebtedness. We incline

to think that such cannot be the rule; but concede that it is; then we may remark that it is substantially stated in the petition that no valid indebtedness existed against the plaintiff at the time the judgment was rendered, for the reason that no cause of action against him was stated in the petition. Such petition is made a part of the petition in this case, and it is averred that the petition in such former action did not allege any facts against the present plaintiff which authorized the rendition of any judgment against him. Upon looking into said petition we find the foregoing statement to be true, and it must be regarded as admitted by the demurrer. This we think should be regarded as a substantial denial that any valid indebtedness existed.

AFFIRMED.

67	316
107	458
67	316
115	448

**CITIZENS' BANK v. RHUTASEL, DEFENDANT, AND TRIGG,
INTERVENOR.**

- 1. Administrator: BY WHOM APPOINTED: EVIDENCE.** It is the duty of the clerk to appoint administrators when the circuit court is not in session; but when it is in session that duty devolves upon the court. (Code, § § 2312, 2315.) But, by whomsoever appointed, it is the duty of the clerk to issue the letters of administration; (Code, § 2365;) so that the fact that letters are issued by the clerk in term time is no evidence that the appointment was not made by the court; but letters appearing to have been so issued may properly be admitted to prove the due and lawful appointment of the administrator.
- 2. Evidence: PRACTICE: READING PART OF DEPOSITION TAKEN BUT NOT USED BY ADVERSARY.** A party may introduce a deposition taken by his adversary, but which he declines to introduce. (See cases cited in opinion.) But whether he should be permitted to introduce a portion only of such deposition depends largely on circumstances. If the witness has been examined as to several transactions, he may introduce his whole testimony touching that transaction, without introducing his testimony as to other transactions; but he should not be allowed to introduce a part only of the testimony relating to but a single transaction, without introducing all that the witness has said on that subject.

3. **Practice in Supreme Court: PRESUMPTION IN FAVOR OF TRIAL COURT.** Where the record does not affirmatively show that the ruling of the trial court was wrong, it will be presumed to have been right.
4. **Evidence: PROPERTY COVERED BY CHATTEL MORTGAGE: IDENTITY: DESCRIPTION.** Parol testimony may be admitted to show the identity of property described in a chattel mortgage, but not to show what property is described in the mortgage, the mortgage itself being the best evidence of that.
5. **Cross-Examination: WHAT IS PROPER.** Questions asked in cross-examination, which have no relation to the subject on which the witness was examined in chief, should be excluded.
6. **Practice: DIRECTING VERDICT: EXAMPLE: FRAUD IN CHATTEL MORTGAGE.** The court is justified in directing the verdict of the jury where there is an entire absence of evidence tending to establish the cause of action or defense alleged in the pleadings. (*Sperry v. Etheridge*, 63 Iowa, 543.) And so, where the issue related to the validity of a chattel mortgage, while there may have been some evidence of a fraudulent intent on the part of the mortgagor, yet, since there was an entire absence of evidence of such intent on the part of the mortgagee, the court was justified in directing the verdict of the jury on that point.

Appeal from Franklin Circuit Court.

FRIDAY, OCTOBER 23.

ACTION on a promissory note executed by defendant, N. J. Rhutasel. A writ of attachment was issued in the cause, and was levied on certain personal property. William Trigg, as administrator of the estate of Lawrence Rhutasel, deceased, filed a petition of intervention, in which he alleged a claim to the attached property under a chattel mortgage, executed by defendant, N. J. Rhutasel, to Lawrence Rhutasel to secure a promissory note for \$588. In his answer to this petition plaintiff alleged that said chattel mortgage was given for the purpose of hindering and delaying the creditors of N. J. Rhutasel in the collection of their debts, and that it was executed in pursuance of a corrupt and unlawful combination and agreement between N. J. Rhutasel and his wife, and Lawrence Rhutasel, his father, and John Rhutasel, his brother, and the intervenor, his brother-in-law, to cheat and defraud plaintiff.

iff and the other creditors of N. J. Rhntasel. It also alleges that intervenor's appointment as administrator was made without authority of law, having been made by the clerk of the circuit court at a time when the court was in session. At the close of the testimony the court directed the jury to find for the intervenor, and a judgment was entered in his favor on the verdict returned in accordance with this direction. Plaintiff appeals.

Taylor & Evans and *D. W. Dow*, for appellant.

Harriman & Luke and *J. H. Bradley*, for appellee.

REED, J.—On the trial intervenor offered in evidence his letters of administration. These letters were signed by the clerk of the circuit court, and were issued under the seal of that court, and were dated at a time when the court was in session in Franklin county. Plaintiff objected to the admission of said letters in evidence on the ground that the clerk had no power during the term of the court to appoint an administrator, but the objection was overruled.

It will be conceded that during the session of the court the power to appoint administrators is in the court, and not in the clerk. Code, §§ 2312, 2315. It does not appear, however, that the appointment in question was made by the clerk. The only evidence that it was so made is the fact that the letters of administration are signed by him. But the office of the letters is to define the powers of the administrator, and they are not the evidence of the source of his appointment. If the appointment is made in term time, it should be made by the court, and the clerk has power in vacation to make it. But in either case it is the duty of the clerk to issue the letters of administration, and they should be signed by him, and be issued under the seal of the court. See Code, § 2365. The objection was properly overruled, then, on the ground that the letters of administration afforded no evidence

1. ADMINIS-
TRATOR: by
whom ap-
pointed; evi-
dence.

of the fact on which it was based, and we need not consider whether the regularity of the appointment could be questioned in a collateral proceeding, a question which was argued by counsel.

II. Plaintiff offered to read the answers of a witness, whose deposition had been taken, to certain of the interrogatories which were asked him. The deposition was taken by intervenor, but was not introduced by him, and he objected to plaintiff's being permitted to introduce but a portion of it. It is well settled that one party may introduce a deposition which was taken by his adversary, but which he declines to introduce. See *Hale v. Gibbs*, 43 Iowa, 380; *Wheeler v. Smith*, 13 Id., 564; *Pelamourges v. Clark*, 9 Id., 1. But whether he should be permitted in such case to introduce but a portion of such deposition depends, we think, very largely on circumstances. If the witness has been examined as to different transactions, we see no reason why the opposite party should not be permitted to introduce his evidence touching one or more of the transactions, while declining to introduce it as to the others. But he clearly ought not to be permitted to introduce a portion of his testimony on any given subject while declining to introduce all that the witness had said on that subject. It would be manifestly unjust to permit him to select such portion of the testimony with reference to a particular transaction as is favorable to him, and introduce that, while he refuses to offer the portions which are unfavorable to him. In the present case counsel for plaintiff stated, when he offered to read the answers of the witness, that they were offered for the purpose of establishing certain facts. The deposition is not contained in the abstract, nor is it stated therein that the offer included all that was testified to by the witness with reference to the facts

sought to be proven by his answers. We are unable to determine from the record, then, whether the offer should have been allowed or

2. EVIDENCE:
practice:
reading part
of deposition
taken but not
used by ad-
versary.

3. PRACTICE
in supreme
court: pre-
sumption in
favor of trial
court.

Citizens' Bank v. Rhutasel et al.

not. The presumption, however, is in favor of the correctness of the ruling of the circuit court on the question.

III. Defendant, N. J. Rhutasel, was examined as a witness on behalf of the intervenor, and testified that the prop-

erty attached was the same that was covered by the chattel mortgage given by him to Lawrence Rhutasel. On cross-examination plaintiff's counsel asked the witness what property he gave

his father a mortgage on, and when he made the mortgage, and whether he delivered the mortgage to his father on the day on which it bears date. The first question was disallowed on intervenor's objection that the mortgage was the best evidence of what property was covered by it, and the others were excluded on the objection that they were not cross-examination. These rulings are assigned as error. We think they were correct. The mortgage was the only competent evidence of the contract between the mortgagor and mortgagee, and it shows what particular property is covered by it. It was competent to prove by parol that the property attached was the identical property covered by the mortgage. But plaintiff's question did not call for a

4. EVIDENCE: property covered by chattel mortgage; identity; description.
5. CROSS-EXAMINATION: what is improper.

description of the property, nor did it relate to the identity of the mortgaged property with that seized on the writ. It in effect asked the witness to determine what property was covered by the mortgage, and clearly it was incompetent. The other questions had no relation to the subject on which the witness was examined in chief, viz., the identity of the property, and were properly excluded on the ground that they were not proper cross-examination.

IV. Plaintiff assigns as error the order of the court directing a verdict for the intervenor. The ground upon

6. PRACTICE: directing verdict; example; fraud in chattel mortgage.

which the order was made was the insufficiency of the evidence to establish the claim made by plaintiff. We have held that the court is justified in taking a case from the jury on this ground

only when there is an entire absence of evidence tending to establish the cause of action or defense which is alleged in the pleadings. *Sperry v. Etheridge*, 63 Iowa, 543. Under the issues plaintiff was required to establish (1) that the defendant N. J. Rhutasel executed the mortgage under which intervenor claims the property with intent to hinder or delay or defraud his creditors, and (2) that the mortgagee accepted the instrument with a like fraudulent intent.

Without setting out the facts and circumstances which the evidence tends to prove, we deem it sufficient to say that they have some tendency to prove a fraudulent intent by N. J. Rhutasel. If the case had involved the question of his intention alone, the plaintiff would clearly have been entitled to the verdict of the jury on the question. But there was, as we think, an entire absence of evidence tending to prove a fraudulent intent by Lawrence Rhutasel, the mortgagee. The existence of the indebtedness for the security of which the mortgage was given is not denied. Nor is it claimed that the debt was one for which the creditor might not honestly and fairly demand and accept security. The creditor probably knew that his debtor was embarrassed, and he may have known that the mortgage would operate to defeat or delay other creditors in the collection of their debts. But with a knowledge of these facts he might lawfully demand security for his debt. And the evidence, we think, has no tendency to prove that he accepted the mortgage with any other motive than a desire to secure his own interest.

We think, therefore, that the case was one in which the court might properly direct the verdict.

We find no error in the record.

AFFIRMED.

67	822
pl14	384

RANKIN V. RANKIN ET AL.

1. **Injunction: NOT ALLOWED WHERE THERE IS REMEDY AT LAW:**
EXAMPLE: ENJOINING SALE OF MORTGAGED CHATTELS. One claiming to have a mortgage on chattels cannot have an injunction to restrain the sale of such chattels under another senior mortgage, on the ground that such chattels are not covered by such other mortgage; because he has an adequate remedy without the interference of equity, in that he may pursue the chattels, by virtue of his mortgage, at any time, into whose-soever hands they may pass by the sale.

Appeal from Wright Circuit Court.

FRIDAY, OCTOBER 23.

THIS is an appeal by plaintiff from the order of the circuit court sustaining a motion to vacate a temporary injunction, which had been issued on plaintiff's petition, restraining the defendants Graham and The Elwood Manufacturing Company from selling certain personal property in a proceeding which they had instituted for the foreclosure of two chattel mortgages, which were executed by the defendant T. D. Rankin.

Nagle & Birdsall, for appellant.

R. H. Whipple, for appellees.

REED, J.—Plaintiff and the defendants Graham and the Elwood Manufacturing Company each hold a chattel mortgage executed by the defendant T. D. Rankin, plaintiff's mortgage being junior in point of time to the others. Graham and the Elwood Company commenced proceedings to foreclose their mortgages by notice and sale, when plaintiff instituted this proceeding, in which he asks that they be enjoined from selling the property until the rights of the parties therein are determined, and asking that the foreclosure proceedings be transferred to the circuit court

for the purpose of having the interests of the parties in the property determined by the court. Defendants' mortgages cover the interests of the mortgagor in the crops of oats and corn then growing on certain designated tracts of land, while plaintiff's covers certain stacks of oats, also the interest of the mortgagor in the crop of corn growing on certain designated lands. Plaintiff's claim is that a portion of the oats in the stacks covered by his mortgage is not covered by defendants' mortgages, and that a large part of the corn covered by his mortgage is not included in theirs.

Before the injunction was served upon them defendants had taken possession of all the property, and had advertised it for sale, and claimed the right to appropriate the whole of it under their mortgages for the satisfaction of their debts. Among other grounds of the motion to vacate the temporary injunction are the following: "On the face of the petition the order for an injunction was improperly granted," and "defendant has a plain, speedy and adequate remedy at law for the wrong of which he complains." Either of these allegations of the motion, we think, affords a sufficient ground for vacating the injunction. A portion of the property which defendants were proceeding to sell was covered by each of the mortgages. Plaintiff's was the junior mortgage. Whatever interest he acquired in this property under his mortgage he took subject to defendant's mortgages. He clearly is in no position to question their right to foreclose their mortgages on the portion of the property which he admits is covered by their mortgages. He alleges in his petition that if defendants are permitted under their foreclosure proceeding to sell the portion of the property which is covered by his mortgage alone, he will suffer irreparable loss and damage, in that he will be deprived of the security afforded by his mortgage for his debt. But we do not see wherein he would be injured by such sale. The purchaser at a foreclosure sale can acquire title thereunder only to such property as was covered by the mortgage. Defendants' mortgages

Chicago, Iowa & Dakota R'y Co. v. Cedar Rapids, Iowa Falls & N-W. R'y Co.

cover certain designated property, and one who should purchase thereunder would acquire only the title and interest on which they operate. Code, § 3312. If, then, the defendants in their foreclosure proceedings should sell any property not covered by their mortgages, plaintiff would not thereby be divested of his interest therein, but he might follow it into the hands of the purchaser and enforce his remedy against it. We are of the opinion, therefore, that plaintiff's petition shows no grounds for the issuance of an injunction.

AFFIRMED.

**THE CHICAGO, IOWA & DAKOTA R'Y CO. V. THE CEDAR RAPIDS,
IOWA FALLS & NORTHWESTERN R'Y CO. ET AL.**

67	334
86	501
67	324
129	756

1. **Demurrer to Answer:** GOOD AS TO PART BUT BAD AS TO WHOLE: IMPROPERLY SUSTAINED. The demurrer to the answer in this case, being to the whole answer, which raised issues which should have been submitted to the jury, was improperly sustained.
2. **Contract in Several Parts:** ALL PARTS CONSTRUED TOGETHER. Where a mortgage was but the execution of part of a contemporaneous written agreement, the mortgage and agreement must be construed together to arrive at the true intention of the parties.

Appeal from Hardin Circuit Court

FRIDAY, OCTOBER 23.

THIS action involves the title to an uncompleted line of railroad located between Forest City, in Winnebago county, and Belmond, in Wright county. There was a demurrer to the answer, which was sustained, and defendants appeal.

S. K. Tracy, for appellants.

John Porter, for appellee.

Chicago, Iowa & Dakota R'y Co. v. Cedar Rapids, Iowa Falls & N-W. R'y Co.

ROTHROCK, J.—The Iowa & Minnesota Railroad Company was organized in 1874, for the purpose of building a railroad from Forest City to Belmond. After procuring the right of way for part of the distance, and doing considerable grading on the line, said company ceased to prosecute the enterprise. In 1881 the Forest City Southern Railway Company was organized for the purpose of constructing a line of railroad between the said points. On the fourth day of June, 1881, the Iowa & Minnesota Railroad Company, by two instruments in writing, one of which was in the nature of a written agreement, and the other in the form of a deed of conveyance, sold all of its right of way, grading and franchise in said uncompleted line of railroad to said Forest City Southern Railway Company. The consideration agreed to be paid for the conveyance was \$5,000, which was to become due on the first day June, 1883. The written agreement provided in substance that the Forest City Southern Railroad Company should carry out the contract of sale and the terms of the written agreement, and should execute a mortgage for the purchase money to the Iowa & Minnesota Railroad Company, which should be recorded in the several counties through which the line of road passed. It was further stipulated that the Forest City Southern Railroad Company should condemn the right of way over said line within ninety days from July 1, 1881, and take possession of said grade, and do the necessary work on the same to secure the line against any other railroad company, and to keep the property free and clear from any mechanics' liens or other incumbrances thereon, so that the mortgage for \$5,000 should be the first lien upon the property. Said written agreement further provided as follows:

“(6) It is further agreed between said parties hereto that in case the five thousand dollars (\$5,000) should not be paid by the first day of June, 1883, without interest, as aforesaid, then and in that case the said Forest City Southern Railway Company shall make, acknowledge, execute and

Chicago, Iowa & Dakota R'y Co. v. Cedar Rapids, Iowa Falls & N-W. R'y Co.

deliver to the said Iowa & Minnesota Railroad Company, or to such person or company as that company may designate, a deed of conveyance, which shall convey to said Iowa & Minnesota Railroad Company, or such person or company as may be so designated, as aforesaid, the said property herein sold to the said Forest City Southern Railway Company, together with the additional improvements thereon that said company may put upon said property, together with the right of way which shall be hereafter procured over said line, which shall include all the line over which and wherever the same has been procured by the Iowa & Minnesota Railroad Company between Belmond and Forest City, together with all the improvements and additions to said property, between the points designated, in Wright, Hancock and Winnebago counties, in the state of Iowa, which said conveyance shall convey said property, and all the rights and franchises, clear from any and all liens and incumbrances of every kind and character made or permitted by said Forest City Southern Railway Company in violation of the terms of this contract.

“(7) It is further agreed that the last division of this contract is subject to this condition: That in case said second party should desire to pay the said sum of five thousand dollars (\$5,000) rather than make said reconveyance, if not before paid, it may have the privilege of so doing by giving sixty days' notice before the first day of June, 1883, in writing, of such desire to J. F. Duncombe, the president of said Iowa & Minnesota Railroad Company, or his successor in office.

“(7) It is further expressly agreed between the parties hereto that the failure to give said notice within sixty days named shall make the sixth division of this contract binding, and if the notice is given, and the five thousand dollars (\$5,000) is not paid by the first day of June, 1883, then, and in either case, said division shall be binding, and said first party may have a strict foreclosure of said mortgage, and have the equity of redemption cut off by a decree of court, or said

Chicago, Iowa & Dakota R'y Co. v. Cedar Rapids, Iowa Falls & N-W. R'y Co.

first party may enforce in equity the making of said deed provided for in said sixth division of this contract, at the option of the first party hereto, or said first party may have such other relief in the premises as the laws or equity can give.

“(9) If said first party should prefer to extend the time beyond June 1, 1883, if the money shall not be before paid, or if the deed shall not be then made, so that the said mortgage shall be in either case satisfied, it may do so, but in that event the sum of five thousand dollars (\$5,000) shall draw interest at the rate of ten per cent per annum, payable annually; but at any time thereafter said first party may end the time so extended by giving sixty days' notice in writing, so that the provisions of this contract would apply at the end of the time of said extension the same as on the first day of June, 1883, except as to accumulated interest.”

The deed conveyed all the right, title, interest and property which the Iowa & Minnesota Railroad Company had in the road-bed, right of way, grading and bridging on the line between the two points above named. The mortgage given to secure the payment of the purchase money contained these provisions: “Provided always, and these presents are on the express condition, that if the said Forest City Railway Company shall perform each and every of the covenants contained in the written contract dated the fourth day of June, 1881, made between the parties hereto at the time and in the manner therein designated, and shall pay the money at the time and in the manner therein provided, or, on a failure to pay the same, shall execute the deed therein required, conveying the property therein agreed to be conveyed, and in every other particular shall comply with the terms, conditions and requirements of said contract at the time and in the manner therein provided, then and in that case the above and foregoing conveyance to be void, otherwise to remain in full force and effect; but if default should be made in the payment of the sum of money as therein provided, at the

Chicago, Iowa & Dakota R'y Co. v. Cedar Rapids, Iowa Falls & N-W. R'y Co.

time therein provided, or if the first party shall fail to proceed to secure the right of way as therein provided, within the time as therein provided, or shall fail to take and hold possession of said property in the manner and form therein provided, or shall fail to perform any covenant contained in said contract between said parties within the time and in the manner provided therein, then the said second party shall have the right forthwith to proceed by strict foreclosure, or by any other lawful mode, to enforce said contract and the mortgage, or collect the money therein provided, together with all the interest and costs, at the option of the said second party."

On the twenty-eighth day of April, 1882, the name of the Forest City Southern Railroad Company was changed to that of the Chicago, Iowa & Dakota Railroad Company, the plaintiff herein. The \$5,000 of purchase money has not been paid. The plaintiff alleges in its petition that it took possession of the road, condemned right of way, and was proceeding to complete the said line in compliance with its contract, and that on the nineteenth day of November, 1883, for the purpose of terminating any further extension of the time of payment of the \$5,000 purchase money, the Iowa & Minnesota Railroad Company, by its proper officer, served notice on the Chicago, Iowa & Dakota Railroad Company, requiring payment to be made within sixty days thereafter; and that on the fifteenth day of January, 1884, the plaintiff tendered and offered to said defendants the full amount of the principal and interest due on said mortgage, and that the tender was refused. The petition charges that the defendants have acquired the interest of the Iowa & Minnesota Railroad Company in said mortgage, and have wrongfully taken possession of the line of road to the great damage of the plaintiff. Damages in the sum of \$300,000 are demanded, and it is prayed that the defendants be restrained from in any manner interfering with or entering upon any part of the grade, road-bed or right of way.

The defendants in their answer deny that the plaintiff has in any manner complied with its contract, and allege that the plaintiff ceased to work on said contemplated line of road, and for years has never done any work thereon, and has abandoned said project, and refused to carry out the wishes of the public in voting taxes and giving aid for the construction of said railway, and that the plaintiff has no right to use, occupy or control any part of said road, because it failed to pay said \$5,000 purchase money by the first day of June, 1883; that it was agreed in said contract and mortgage that if the said purchase money was not paid when due, the said Forest City Southern Railroad Company should reconvey, by a proper deed, to the Iowa & Minnesota Railroad Company, or to such person or company as it should direct, all the property, rights and improvements made on said line between Belmond and Forest City, free from any and all liens and incumbrances made by the said Forest City Southern Railway Company; and that on the nineteenth day of November, 1883, the Iowa & Minnesota Railroad Company declared the rights of the plaintiff to the property forfeited, and on said last date demanded a reconveyance of the same.

The answer further avers that on the twenty-first of November, 1883, the said Iowa & Minnesota Railway Company made and delivered to one of the defendants a deed of conveyance of all of said property, and that thereunder said defendant was in possession and subrogated to all the rights of the vendor in said property. It is expressly denied in the answer that any extension of the time of payment of the purchase money was at any time given by any act of the Iowa & Minnesota Railroad Company. The defendant prays that the plaintiff may be ordered and decreed to reconvey all said right of way, road-bed and improvements on said line to the defendants, and that all right and claim of the plaintiff thereto be declared null and void.

It is exceedingly doubtful whether the demurrer should have been entertained by the court. There is but one defense

Chicago, Iowa & Dakota R'y Co. v. Cedar Rapids, Iowa Falls & N-W. R'y Co.

1. DEMURRER to answer: good as to part but bad as to whole: improperly sustained. set up in the answer. It consists of explicit denials of certain averments of the petition, and averments of other facts; and upon these denials and averments the defendants claim that the plaintiff has no right to the property, and demand a conveyance of it to the defendants. It is not a case of a demurrer to one of two distinct and independent defenses set up in one count of the answer, as in *Wright v. Connor*, 34 Iowa, 240. In the language of the demurrer, it assails that part of the answer which is in the nature of a cross-petition asking affirmative relief, and which asks that plaintiffs be required to make a deed of conveyance of the property in controversy. The affirmative relief demanded is based wholly upon the denials of the answer, and the averments of fact therein contained. It is averred in the answer that the plaintiff abandoned the line of road, and suffered a forfeiture of all its rights, by failing to pay the purchase money.

These averments must be taken as true upon demurrer. What the plaintiff seeks to have determined by the demurrer is that time is not the essence of the written agreement and mortgage. This proposition, we think, is correct. Both instruments must be construed together. They are parts of the same transaction, and by their terms time is not of their essence. Indeed, it appears that such was not the intention of the parties. The plaintiff did not forfeit all right under the conveyance made to it by merely failing to pay the purchase money when it became due; but if it abandoned the line, or forfeited its rights for any other reason, it is in no position to demand that the defendant shall take up its railroad track, and cease to operate the road. These questions should be determined upon a trial of the cause. They cannot be properly determined by demurring to a part of the answer.

REVERSED.

MARLING V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.

1. **Practice in Supreme Court: DISCRETION OF TRIAL COURT IN ALLOWING AMENDMENT NOT INTERFERED WITH.** This court does not interfere with the discretion of trial courts in allowing amendments within the time fixed by statute. Accordingly, an order allowing an amendment to the answer, in the nature of a cross-petition, in this case, when it was called for trial, will not be reviewed.
2. **Trial by Jury: EQUITABLE ISSUES RAISED BY CROSS-PETITION IN LAW ACTION.** When an action is begun by ordinary proceedings, but a cross-petition is filed showing facts under which complete relief cannot be granted at law, the case is a proper one for equitable cognizance, and the plaintiff cannot insist on a trial by jury.
3. **Railroads: CONDEMNATION OF RIGHT OF WAY: PAPERS LOST: OTHER EVIDENCE.** The condemnation papers for the right of way in question being lost, the facts of condemnation and the payment of the award to the plaintiff were sufficiently established for the purposes of the case by other evidence. See opinion.
4. ———: ———: **EVIDENCE OF SUCCESSION TO RIGHTS OF CONDEMNING COMPANY.** Where it was shown by parol that the condemning company had changed its name, and that the defendant held under a conveyance from one who purchased the right of way at a foreclosure sale in an action brought against the condemning company, in its new name, *held* that this was sufficient evidence that defendant had succeeded to the rights of the condemning company, especially where there was no adverse claim made by the condemning company or any one claiming under it.
5. ———: ———: **NON-USER: STATUTE OF LIMITATIONS: ESTOPPEL.** The evidence (see opinion) fails to establish plaintiff's claim that the right of way in question had been abandoned for more than ten years; and, besides, he is precluded from insisting upon such abandonment by his agreement, made with defendant's lessee, whereby said lessee constructed, and has ever since maintained, the very road of which he now complains.

Appeal from Johnson District Court.

FRIDAY, OCTOBER 23.

THIS is an action by which the plaintiff seeks to recover damages for an alleged trespass upon certain lands. There

Marling v. The Burlington, Cedar Rapids & Northern R'y Co.

was an answer and an amendment thereto in the nature of a cross-petition in equity. A trial was had to the court, and a decree was entered for the defendant. Plaintiff appeals.

Milton Remley and L. W. Clapp, for appellant.

Boal & Jackson, for appellee.

ROTHBOCK, J.—The plaintiff by his petition claims that in October, 1879, the defendant wrongfully, unlawfully, and without permission of plaintiff, entered upon and took possession of a strip of land 100 feet wide running through plaintiff's farm, and constructed a railroad track upon the same, and is now operating a railroad thereon, and he demands a judgment for \$1,200 for said wrongful trespass and injury. The defendant by its answer admits that it is in possession of the land, but claims that such possession is rightful, for the reason that in the year 1867 a corporation known as the Iowa Northern Central Railroad Company, organized for the purpose of building a line of railroad from the city of Keokuk, Iowa, through the counties of Lee, Henry, Washington and Johnson, surveyed its line through the lands of the plaintiff, and upon the 100 feet described in plaintiff's petition, and applied to plaintiff to purchase the right of way therefor, which was refused; that thereupon said company caused a sheriff's jury to appraise the damages resulting from the taking of said land, and that the compensation to which plaintiff was entitled was assessed by said jury at \$700, which sum was paid to plaintiff in August, 1867, and that said company then entered upon said premises and constructed a road-bed thereon; that in 1879 the Iowa City & Western Railway Company, having succeeded by purchase to all the rights of the Iowa Northern Central Railroad Company, constructed thereon the road of which plaintiff complains; that said Iowa City & Western Railroad Company applied to plaintiff for an instrument of release of any claim he might have in said

Marling v. The Burlington, Cedar Rapids & Northern R'y Co.

land; that it was then agreed between the parties that said railroad company should build a bridge at such an elevation as to permit plaintiff's stock to pass under said railroad track, and in fencing its right of way it should place the fence not to exceed twenty-five feet from the center line of its track, along the west side thereof, from the north line of plaintiff's land to the south side of what was then the garden about the plaintiff's house; that in consideration of this agreement to bridge and fence, as stated, plaintiff consented to release any and all right he might have in any part of said 100 feet by reason of lapse of time and non-user; that the said company, relying upon said agreement, constructed the road and the underground pass, and in so doing expended large sums of money; that thereafter the said Iowa City & Western Railway Company leased the said road to the defendant.

When the case was called for trial, leave was granted to the defendant to amend its answer. An amendment was filed in the nature of a cross-petition in equity, which, in addition to the averments of the original answer, set forth that the sheriff under whom the condemnation was made in 1867 died long since, and that defendant has made diligent efforts to procure the proceedings of said condemnation; that the same have never been recorded, and cannot now be found; that the defendant is entitled to have its right and title as lessor ascertained, and quieted as against the plaintiff's claim of title in the land; and praying that the Iowa City & Western Railway Company be decreed to be the owner of said right of way, and that this defendant as lessee is entitled to the occupation thereof, and to have such rights fully and forever quieted as against any and all claims of plaintiff. The plaintiff moved to strike the cross-petition from the files because filed without leave of the court, and because it was not filed until the cause was reached for trial. The motion was overruled. Thereupon the plaintiff demurred to the cross-bill, and the demurrer was overruled. Afterwards the plaintiff replied to the answer and cross-bill, in which he denied that any con-

Marling v. The Burlington, Cedar Rapids & Northern R'y Co.

demnation proceedings were had, and pleaded that the road was abandoned by the Iowa Northern Central Railroad Company, and that the plaintiff was in the open, notorious and adverse possession of said right of way, under color of title and claim of right, for more than ten years after said abandonment, and before his possession was disturbed by the defendant.

There are many other averments in the several pleadings not necessary to be recited in this opinion. We think we have set out enough to make plain the grounds upon which we determine the rights of the parties.

I. It is claimed by the plaintiff that the motion to strike the cross-petition should have been sustained, because it was filed when the cause was called for trial. It is scarcely necessary to say that the pleading was in the nature of an amendment, and we do not interfere with the discretion of trial courts in allowing amendments within the time fixed by the statute.

1. PRACTICE
in supreme
court: discre-
tion of trial
court in allow-
ing amend-
ment not in-
terfered with.

II. The plaintiff demanded a trial by jury, and he complains because his request was denied. The answer and cross-petition presented an equitable issue. The defendant was in possession of the land, and the plaintiff commenced his action for trespass. The action for trespass was not based upon a mere possessory right to the land in the plaintiff. He claimed to recover because he was the owner of the right of way 100 feet wide, and because the defendant unlawfully and wrongfully trespassed upon it. The apparent title of record was in the plaintiff. The defendant claimed the right to the possession of the land under the alleged condemnation proceedings, and alleged that all of the papers in connection therewith were lost. It was the right of the defendant to demand equitable relief and a decree quieting its rights to the land. It was entitled to a decree fixing the rights of the parties to the land. It is said that the defendant could have shown

2. TRIAL by
jury: equit-
able issues
raised by
cross-petition
in law action.

Marling v. The Burlington, Cedar Rapids & Northern R'y Co.

every fact pleaded on a trial in the action at law for trespass, and that a judgment would have settled the rights of the parties. We think the defendant was entitled to more than this. It could demand that if it had a valid right of way that right should be made of record in a plainer and more specific manner than a mere judgment at law in its favor in an action for trespass. The decree of the court requiring the defendant to remove its fence on one side of the right of way twenty-five feet nearer the center of the track, to correspond with an agreement of the parties, shows that it was a proper case for equitable cognizance. We think the court properly ruled that the claim made by the defendant should be tried as in equity, and without a jury, and we think that it was the right of the defendant, as a lessee claiming under the Iowa City & Western Railway Company, to assert its right against the plaintiff without making said company a party. The lease appears to have been for a term of fifty years, with the right of renewal at the expiration of that time.

III. It is urged that there was no competent evidence that there ever was any legal condemnation of the land. It appears that a sheriff's jury condemned adjoining lands, and on the same day went upon the plaintiff's farm, after the stakes were driven and the line located, and that they fixed the damages at \$700, and the treasurer of the company paid the plaintiff the full amount awarded to him, and that the Northern Iowa Central Railroad Company were forbidden by the plaintiff to enter upon his farm to grade the line until after the condemnation, and that after he received payment for the right of way the company entered upon the land and made the grade without objection from him. And it is fully shown that the condemnation papers are lost. It is true, the plaintiff, in his testimony as a witness, denies some of these facts, but his denial cannot overcome the testimony of a number of credible witnesses. It will be readily seen that, having

3. RAILROADS: appears that a sheriff's jury condemned adjoining lands, and on the same day went upon the plaintiff's farm, after the stakes were driven and the line located, and that they fixed the damages at \$700, and the treasurer of the company paid the plaintiff the full amount awarded to him, and that the Northern Iowa Central Railroad Company were forbidden by the plaintiff to enter upon his farm to grade the line until after the condemnation, and that after he received payment for the right of way the company entered upon the land and made the grade without objection from him. And it is fully shown that the condemnation papers are lost. It is true, the plaintiff, in his testimony as a witness, denies some of these facts, but his denial cannot overcome the testimony of a number of credible witnesses. It will be readily seen that, having

Marling v. The Burlington, Cedar Rapids & Northern R'y Co.

received his damages for the right of way, he is in no position to cavil about the sufficiency of the proof of the contents of the condemnation papers, nor of the fact, as he claims, that no notice of the condemnation proceedings was given to him. He was present when the sheriff's jury viewed the land and made the assessment.

IV. Next it is claimed that it does not appear from the evidence that the defendant and its lessor have succeeded

4. —: —: to the rights of the Iowa Northern Central Railroad Company. It is shown that the last-named company changed its name and became
evidence of succession to rights of condemning company.

known as the Keokuk, Iowa City & Minnesota Railroad Company. It is true, this fact was not shown by any recorded proceedings of the company. But an action was afterwards brought by one Johnson against the last-named company, and a lien against the line was foreclosed, and a sale of the road had under the decree. The Iowa City & Western Railway Company hold under a conveyance from the purchaser at the foreclosure sale. We think this is a sufficient showing that the defendant and its lessor are the successors in interest of the Northern Iowa Central Railroad Company. It surely is sufficient in consideration of the fact that the last-named company failed to complete the line, and passed out of existence, and no one makes any claim adverse to the claim of the defendant.

V. It is next urged that any claim held by the defendant is barred by the statute of limitations. Upon this question

5. —: —: the preponderance of the evidence is against the plaintiff. It is true, he testifies that no work
non-user; statute of limitations; estoppel.

was done on the right of way on his farm after 1867 until 1879, a period of more than ten years. But other satisfactory evidence shows that the work was prosecuted on the farm as late as November, 1869, which would make the period of non-user and abandonment less than ten years. Aside from this, the plaintiff is in no position to assert the statute of limitations, because he received

Becket v. The Iowa Improvement Co.

the damages for the right of way, and in 1879 made an agreement with the Iowa City & Western Railway Company, under which that company went into possession, and with his consent finished the road, and operated it for more than three years and a half before he discovered that he ought to be again paid for the right of way. This action was commenced on the sixteenth day of May, 1883.

We think the decree of the court below ought to be

AFFIRMED.

BECKET V. THE IOWA IMPROVEMENT CO.

1. **Principal and Agent: ACTION FOR SERVICES: COUNTER-CLAIM FOR MONEY RECEIVED AND NOT ACCOUNTED FOR: BURDEN OF PROOF.** Plaintiff sued for a balance of his salary as defendant's pay-master. Defendant set up a counter-claim for \$100, which, it alleged, plaintiff had received, with other money, for disbursement, and had not accounted for. Plaintiff's defense was that, if the money came into his hands, it was lost through no negligence on his part. *Held* that the burden of proof, under the issues, was upon plaintiff to establish his defense, and not upon defendant to negative it; and, there being some evidence, at least, that plaintiff received the money in question, an instruction asked, expressing the doctrine above announced, should have been given.

Appeal from Marshall Circuit Court.

FRIDAY, OCTOBER 23.

PLAINTIFF brought suit to recover a balance of \$136.80, which he alleged was due him for services rendered by him for defendant, and for expenses incurred by him while performing such services. He alleges that he was employed by defendant at the agreed price of \$75 per month, and that he labored for it under such employment during the months of May and June, and for eighteen days in July, 1884, and that he incurred expenses while so employed to the amount

Becket v. The Iowa Improvement Co.

of \$9.25, which defendant agreed to pay, and that it had paid him but \$66 on said account. Defendant admitted that plaintiff was employed by it at the price stated in the petition, and that he had worked during May and June, and for seventeen days in July, and that it was indebted to him therefor, and for the item of \$9.25 for expenses, the amount of indebtedness admitted being \$134.39; and for a counter-claim it alleged that during the time of his employment plaintiff received into his possession the sum of \$8,000 belonging to defendant, which it was his duty to disburse for it, and that of said amount he had failed and neglected to account for \$100, and that he wrongfully retained the same and refused to return it to defendant. There was a verdict and judgment for plaintiff for \$135.75, and defendant appeals.

Parker & Childs, for appellant.

Brown & Carney, for appellee.

REED, J.—The only material question in the case arises on defendant's counter-claim. The defendant, as we understand, was engaged in operating a railway. It was plaintiff's duty by virtue of his employment to go out on the line of the road at certain times and pay the hands employed in the work of operating it. About the fourteenth of January, 1884, he received from defendant's treasurer a check for \$8,000 on the bank in Marshalltown with which defendant kept its account. On that day he presented the check at the bank and received the money thereon, which he took to defendant's office and placed in a safe. On the next morning he took the packages of money out of the safe, and started out on the road, accompanied by another employe of the defendant, to pay the men. They traveled in a car which was fitted up for the purpose. Plaintiff had charge of the money, and he sat at one window, while the other employe

sat at another with the pay-roll. When a man presented himself to receive his pay, the other clerk would give him a statement on a ticket from the pay-roll of the amount due him, which he would then present to plaintiff, who would pay him the amount. They returned to Marshalltown the same evening, and, after ascertaining from an examination of the pay-roll and tickets the amount they had disbursed, and counting the remaining money, they discovered that there was a discrepancy of \$100 between what they had and the amount they should have had. Plaintiff carried the money during the day in a valise, which had been used on other occasions for the same purpose. The key to this valise had been lost, and there was no means of locking it. On one occasion during the day he left the valise, with the money in it, in charge of a station agent of defendant, while he ate his dinner. On another occasion he left the car, and was absent for a short time, leaving the money in it. The other clerk was in the car during his absence. Defendant asked the circuit court to instruct the jury that, if the plaintiff received the \$100 in issue, he was responsible for its safe keeping and disbursement, and the burden was on him to satisfactorily account for all the funds received by him, and, unless he had shown that the \$100 was lost without fault or neglect on his part, they should allow defendant that amount in their verdict. The court refused to give this instruction, but told the jury that, while plaintiff would be chargeable with said sum if the loss occurred through any fault or negligence of his, the burden was on defendant to show that it was lost through his neglect or fault.

In our opinion the instruction asked by defendant correctly expresses the rule as to the burden of proof under the pleadings, and should have been given. The allegation of the counter-claim was that plaintiff received \$8,000, which it was his duty, by virtue of his employment, to disburse or account for, and of that amount he had not disbursed the sum in controversy, neither had he accounted for or returned it to

defendant, although demand therefor had been made. There was no averment that the money was lost, nor did defendant seek to recover on the ground that plaintiff had been negligent in the performance of the duties of his employment; but the *gravamen* of its complaint is that he had failed to either disburse or account for the money. Its claim, then, would be established by proof that he had received the money, and that he had neither disbursed nor returned it. On proof of these facts it would be entitled to recover, unless plaintiff could establish some matter in avoidance.

Plaintiff's defense is that, if the money came into his hands, it was lost through no negligence on his part. In effect, he asserted that he transacted the business with diligence and care, and for that reason was not chargeable with the loss. The burden of proving this claim was clearly on him. The question whether the burden of proof as to any particular fact in the case is on plaintiff or defendant depends upon whether it relates to the cause of action alleged or to the defense.

It is contended, however, that it was not proven that the money ever came into plaintiff's hands. It is admitted that he received the money from the bank and placed it in the safe in defendant's office, and that on the next morning he took the packages out of the safe. But it is shown that another employe or officer of defendant had a key to the safe, and it is insisted that it cannot be assumed that the packages, when they were removed from the safe, contained the same amount of money which was in them when they were placed there, without proof that the safe or its contents had not been tampered with in the mean time. We think, however, that the question whether the packages contained the full amount of \$8,000 when plaintiff removed them from the safe was for the jury. The fact that there was nothing in their appearance at that time indicating that any portion of their contents had been removed would have some tendency to prove that they contained the same amount as when they

Powers v. Strout.

were placed in the safe the evening before. It cannot be said, then, that there was no evidence tending to prove that plaintiff received the money.

The judgment of the circuit court will be reversed and the cause will be remanded for a new trial.

REVERSED.

POWERS V. STROUT.

67	341
93	480

1. **Contract: SALE OF PHYSICIAN'S GOOD WILL: BREACH: EVIDENCE.**

Plaintiff, a physician, as a part of the consideration which induced defendant to purchase certain property, agreed to relinquish to him his practice of medicine and surgery in P. and surrounding country for three years, reserving only the right to practice in special cases, emergencies and consultations. *Held* that the evidence did not show a breach of such agreement,—the practice of which defendant complains being fairly covered by the reservation.

Appeal from Butler District Court.

FRIDAY, OCTOBER 23.

THIS is an action for the foreclosure of a mortgage upon certain real estate. It appears that the mortgage was given in part to secure the purchase money of the mortgaged property, which consisted of certain town lots, upon which there was a dwelling-house, barn and office. Both parties are physicians. As part of the consideration for said property the plaintiff undertook to transfer his medical practice to the defendant. The parties entered into a written contract in which the plaintiff bound himself to abstain from the general practice of medicine in Parkersburg (the place where the property was situated) and in the surrounding country for three years. The defendant claims that the plaintiff violated this contract, and he seeks to set off against the mortgage damages provided for in the contract in the event of a failure upon the part of plaintiff to observe its

stipulations. There was a trial to the court, and a decree for the plaintiff. Defendant appeals.

J. H. Scales and Gibson & Dawson, for appellant.

H. C. Hemenway and Powers & Lacy, for appellee.

ROTHROCK, J.—That part of the written contract which is material to the determination of the case is as follows:

“And the said M. I. Powers hereby agrees, in consideration of the above specified sum of three thousand dollars, to sell and convey to the said A. O. Strout the above described lots, numbered two and three, and to execute to said A. O. Strout a good and sufficient warranty deed therefor, together with all the appurtenances thereto belonging, and to relinquish and give up to said A. O. Strout his general practice of medicine and surgery in Parkersburg, Butler county, and the surrounding country, for the period of three years from the date hereof, reserving only the right to practice in special cases, emergencies and in consultations.”

The plaintiff, upon giving the defendant possession of the property, removed to his farm, some three miles from the village. He ceased to keep an office, and we think the evidence does not show that he violated his contract. It is claimed by plaintiff that after the contract was executed it was orally agreed between the parties that he should not practice to exceed what would make an income of \$1,000 a year. The defendant insists that such a modification of the contract would be void, as being without consideration. We need not determine this question, because we think the evidence does not show a violation of the contract as it was written. It is true, the plaintiff attended some cases after the commencement of the three years. But he was not entirely precluded from practice by the contract. What is meant by practicing in “special cases” is not defined in the contract. It does not mean special diseases, because the plaintiff was not a specialist in his profession. It is exceedingly difficult

Morris v. The City of Council Bluffs.

to attach any precise meaning to the term. The proof shows that the plaintiff had been practicing his profession at Parkersburg for a number of years, and the defendant was a stranger in that neighborhood. There were one or more cases of obstetrics which occurred soon after the contract was made. The plaintiff had been employed to attend the cases before he sold out to the defendant. There were also some cases of chronic diseases which plaintiff had been attending, and he had some relatives in the neighborhood to whom he afterwards gave medical treatment, and a few other cases. We think it is fair to assume that the parties, by using the term "special cases," meant such cases as these. In other words, they intended that the plaintiff should attend such cases as afforded special reasons for calling upon him rather than another physician. The evidence does not show that plaintiff acted in bad faith. On the contrary, so far as is shown from the evidence, he endeavored to introduce the defendant to his practice, and whenever called upon for his services he recommended patients to apply to the defendant. In our opinion there is no evidence to authorize any damages nor to enforce the forfeiture provided for in the contract.

AFFIRMED.

MORRIS V. THE CITY OF COUNCIL BLUFFS.

1. **Cities and Towns: GRADING STREETS: PROVIDING WAY OF ESCAPE FOR OVERFLOWING WATER.** Water overflowing its channels is practically surface water, and a city in grading its streets is not obliged to provide adequate and permanent means of escape for such water, so as to keep it from flowing, on account of the grade, upon land not raised to grade. Compare *Freburg v. City of Davenport*, 63 Iowa, 119. An instruction herein to the contrary disapproved.
2. **—: CHANGE OF GRADE OF STREET: DAMAGES TO LOT-OWNER.** Before a lot-owner can recover of a city for damages to improvements on his lot by reason of a change in the grade of a street, he must show, not only that the improvements were made according to the actual grade

67	343
99	600
67	343
106	466
67	343
120	558
67	343
127	532
4127	533

Morris v. The City of Council Bluffs.

of the street at the time, but that that grade was the one then established by the city.

3. **Instructions:** MUST CONFORM TO THEORY ON WHICH CASE IS TRIED. Instructions should be harmonious with the theory on which the case is tried. For a violation of the rule see opinion.

Appeal from Pottawattamie Circuit Court.

FRIDAY, OCTOBER 23.

ACTION to recover for an injury alleged to have been sustained by the overflow of water, caused by the raising of certain streets without providing sufficient means for the escape of the water. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

G. A. Holmes, for appellant.

C. R. & E. H. Scott, for appellee.

ADAMS, J.—The plaintiff owns and resides upon a certain lot in the city of Council Bluffs. The injury complained of was caused by the overflow of such lot. The plaintiff purchased and built upon the lot many years ago. It was on what might be called low ground, but it was a little higher than most of the land about it, which was generally not very far from level, and no great injury appears to have been suffered from the overflow of water until the injuries complained of, which occurred in 1883 and 1884. During these years there were some very large rainfalls. A stream called "Indian Creek," which runs within about a block of plaintiff's premises, overflowed its banks, and the water therefrom, and surface water flowing from other directions, overflowed the plaintiff's lot and caused considerable damage. To what extent, if any, this would have happened if the surface of the ground in that neighborhood and the creek had been left in their natural condition it is impossible to determine. A

railroad company had built a bridge across the creek, which in time of very high water operated as a partial obstruction, and caused the creek to overflow, and certain streets in the neighborhood had been raised by embankments, which in time of flood obstructed the spread of the water, and caused it to accumulate on plaintiff's lot. Culverts, it is true, were constructed; but they were not sufficient to carry off all the water. The city in raising the streets only brought them to an established grade, but the plaintiff allowed his lot to remain about three feet below such grade. If he had raised his lot to the grade, the evidence tends to show that he would have sustained but little, if any, injury from any overflow which occurred.

I. Upon this state of facts the court gave an instruction in these words: "Under the laws of this state, the city of

1. CITIES and towns: grading streets: providing way of escape for overflowing water.

Council Bluffs has the legal right to establish the grade of its streets, and to fill such streets to the established grade; but in so doing it has no right to deprive others of their property rights in water-courses, or to injure them by badly-constructed and insufficient culverts obstructing the free flow of the water, without being liable therefor. In this case, if you find from the evidence that the city filled Third avenue, Court and Sixteenth streets, and in so doing caused an increased flow of water from Indian creek over and upon the premises in controversy, and thereby the property of the plaintiff was damaged, then the defendant is liable therefor, unless you further find that the defendant and its employees used ordinary care in the construction of said grades and in furnishing sufficient culverts and passage-ways for the free flow of the water of Indian creek naturally flowing over said premises. In cases of obstruction of natural water-courses, the good faith and honest judgment of the city authorities is no defense for constructing inadequate culverts and water-ways. In such cases the defendant city must use ordinary diligence in guarding against, not only the ordinary flow of water in the stream,

Morris v. The City of Council Bluffs.

but also such as may be reasonably expected to occur. The principles of law above assumed do not, however, apply to mere surface water. The municipal authorities may exercise their powers in grading the streets of the city without being liable for the consequential damages caused to adjacent owners by mere surface water, unless such work is done with the intention of turning such water onto the adjacent owner."

The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained. There was no evidence that the city obstructed the water of Indian creek, so far as the channel was concerned. The only water of Indian creek which was obstructed by the defendant was the overflowed water abroad in the city. Such water is practically surface water. It occupies, temporarily, land used for other purposes. The right to divert or impede its flow is quite different from the right to divert or impede the flow of water in its channel. The Mississippi and Missouri rivers, in their great periodical rises, occupy for a few days, and sometimes longer, large tracts of valuable agricultural lands and portions of towns and cities. These overflows are more or less interfered with by the construction of levees, highways, railroads, buildings, etc. These structures sometimes deepen the overflow in other places, and sometimes retard or prevent a reflow. But it has never been held, so far as we are aware, that the same rule applies which is applicable to the obstruction of a natural stream in its channel. Overflowed water is an outlaw, tending to interfere with the legitimate use of the land which it overflows. In the natural progress of improvements it may be expected that it will become more and more restricted.

The right of a land-owner to demand a spread or unrestricted overflow for the purpose of lightening his own burden was expressly denied in *Hoard v. City of Des Moines*, 62 Iowa, 326. The plaintiff contends that he had a right to demand of the city protection even against surface water, and cites *Cotes v. City of Davenport*, 9 Iowa, 227, and *Ross v.*

Morris v. The City of Council Bluffs.

City of Clinton, 46 Id., 606. But this court has never gone further than to hold that the city must provide temporary means of escape for surface water, if, indeed, it has gone that far. On the other hand, it has held that an owner of a lot below grade must take notice of any exposure created by bringing a street to grade, and must exercise reasonable diligence to protect himself by bringing his lot to grade. *Freburg v. City of Davenport*, 63 Iowa, 119. The instruction in the case before us proceeds upon the theory that the defendant was bound to provide adequate and permanent means of escape for the water overflowing from Indian creek.

II. The court gave an instruction in these words: "It is claimed by the plaintiff that, before the establishment of the permanent grade of the streets adjacent to the property of the plaintiff by the municipal authorities of the defendant, he had made valuable improvements on his said premises, which have been damaged, as is alleged, by such change of grade. If you find from the evidence that the city of Council Bluffs prior to the time of the accruing damage to the plaintiff, if any, had established a grade for the streets and alleys of the city adjacent to the property of the plaintiff, and that, after such grade was so established, the plaintiff built or made any improvements on such street or alley according to the established grade, and that, after such improvements had been built or made, the said city altered such grade so established prior to the making of such improvements in such manner as to injure or diminish the value of the plaintiff's property, then the defendant is liable to the plaintiff for the amount of such damage or injury caused by such alteration in the grade; but if the plaintiff's improvements were not made in accordance with the old grade, or if they were made prior to the establishment of any grade at all by the city on the said adjacent street and alleys, then the defendant is not liable on that account."

2. ———;
change of
grade of
street: dam-
age to lot-
owner.

The giving of this instruction is assigned as error. We

Morris v. The City of Council Bluffs.

have read and re-read with considerable care the argument of defendant's counsel upon this assignment of error, and have to confess that we do not understand what the objections are which he claims to have to the instruction. Under such circumstances we might feel justified, if we had not already found error in the case, in passing the instruction without expressing any opinion upon it. But as the case is to be remanded for retrial, we deem it proper to say that we do not discover any proper averment in the plaintiff's petition upon which the instruction can be based. The averment upon which we suppose the plaintiff relies is in these words: "During the years 1883 and 1884 the defendant caused the streets adjacent to his lot to be filled with large embankments of earth to a grade which said defendant established some five feet higher than the former grade, after all of plaintiff's said improvements had been built in accordance therewith." The plaintiff assumes that there was a former grade. What he meant by former grade is uncertain. He does not aver that any grade *was established*, and we are inclined to think that all that was meant by former grade was the surface of the street, as the same was constructed. He should have brought himself within the statute by averring that a grade was established, and that his improvements were made in accordance with it as established.

III. The court instructed the jury in these words: "The claim made in this case is not for a continuing nuisance for which damages may be recovered from time to time, but for a permanent injury to the plaintiff's real estate. If he is entitled to recover at all in this case under the pleadings and evidence, the measure of his damage is the difference between the market value of the property in question immediately prior to the injuries complained of and the market value after the same occurred." The giving of this instruction is assigned as error. If there had been any proper foundation for the recovery of damages for change of grade, the instruction, so far as it went,

3. INSTRUCTIONS: must conform to theory on which case is tried.

might be considered proper in regard to such damages. But the case was tried upon the theory that the city was bound to construct and maintain sufficient culverts to allow the spread of the overflowed water from Indian creek, and that there was evidence tending to show that thus far the culverts made had been insufficient. Evidence, too, was admitted tending to show the value of the premises for use as overflowed, and as subject to be overflowed, without any reference to their being raised to grade or change in its culverts.

Upon such theory of the case it appears to us that the instruction was erroneous. If it had been the defendant's duty to construct and maintain culverts sufficient to allow a spread of the overflowed water, the case should have been tried upon the theory that the defendant would, upon a judicial determination of its duty, proceed to put in and maintain the proper culverts; and if it did not, and other floods should occur, and more damage should be sustained by the plaintiff, the defendant would again be liable. We do not say that the case is one in which under any possible supposition the plaintiff can become entitled to maintain successive actions. We merely say that he might do so upon the theory upon which the case was tried in part, and that the instruction was inharmonious with that theory and prejudicial.

The judgment of the circuit court must be

REVERSED.

67	350
100	392
67	350
106	234
67	350
107	254
67	350
130	306

CLANTON V. THE DES MOINES, OSCEOLA & SOUTHERN R'Y
Co.

1. **Principal and Agent: DECLARATIONS OF AGENT TO PROVE AGENCY.**

Where the fact of agency is conceded, the acts and declarations of the agent pertaining to contracts made by him within the scope of his agency are competent evidence, and binding on his principal; but such acts and declarations are not admissible to prove the fact of agency.

Appeal from Madison Circuit Court.

FRIDAY, OCTOBER 23.

THIS is an action at law by which plaintiff seeks to recover of the defendant the contract price for certain railroad ties which he alleges he sold to the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

George W. Seevers and Ruby & Wilkin, for appellant.

V. Wainwright, for appellee.

ROTHROCK, J.—The principal question in the case is one of fact. It appears that the railroad company did not contract directly with the parties who furnished ties for the road. One Ball made contracts for the purchase of all the ties for the line from Des Moines to Osceola. The plaintiff made his contract directly with one Thompson, who was authorized by Ball to make purchases. The defendant claimed, in its answer and upon the trial, that Ball bought and furnished the ties as a contractor, and not as agent of the company, and that the company, having settled with and paid Ball in full for all ties furnished by him, was not liable to the plaintiff. The plaintiff did not avail himself of the provisions of the mechanic's lien law, and under the issues made in the case it was incumbent on him to prove that Ball was the mere agent

of the company, and authorized by it to contract in behalf of the company. Ball had no connection with the defendant as an officer, superintendent, director or manager. The executive committee of the company had the general management of the construction of the road. It is not claimed that the plaintiff made any contract with any member of this committee. His contract was made with Ball through his agent, Thompson. To authorize a verdict for the plaintiff, it was necessary for him to prove that Ball was the mere agent of the defendant. He opened his case to the jury by evidence of the acts and declarations of Ball. This evidence was objected to as not admissible to bind the defendant. The evidence was allowed to go to the jury upon the undertaking of the plaintiff that he would "correct this matter, and show that Mr. Ball was the agent of the defendant."

This evidence, which was objected to, tended to show that Ball was acting merely in the capacity of agent. The first witness examined in the case stated that Ball, in answer to the question whether he (Ball) would have any work for the witness to do, replied as follows: "I can't tell. Harding and Stivers will be here next week to my house and I can let you know then. Stivers holds me back, and Harding tells me to go ahead and buy timber." The defendant moved to strike out this evidence, and the motion was overruled. Stivers and Harding were members of the executive committee of the defendant. If it were conceded that Ball was the agent of the defendant to purchase ties, his acts and declarations pertaining to contracts made by him within the scope of his agency would be competent evidence and binding upon the defendant. But in the case at bar the very issue presented to the jury was whether Ball was the agent of the defendant. And it is not claimed by the plaintiff that agency can be shown by the acts and declarations of the alleged agent. That this is the law cannot be questioned. If the law were otherwise, one person might be held liable by proving the acts and declarations of another without any

The State v. Crosby.

authority from the person sought to be charged as a principal. The overwhelming weight of the evidence in this case was to the effect that Ball furnished the ties as a contractor, and that he had no authority to bind the defendant to pay his contract for ties. In this state of the case, the evidence as to the acts and declarations of Ball were plainly prejudicial to the defendant. They ought not to have been allowed to go to the jury, and should have been ruled out when the motion was made asking such ruling. The evidence, so far as it tended to show Ball's agency, was inadmissible, even though the plaintiff did undertake to show, in the further progress of the trial, that Ball was the defendant's agent. Ball's acts and declarations would not be made available as evidence of his agency in any stage of the trial, and the jury should have been plainly and explicitly directed that they must not consider any of Ball's acts, conversations or conduct as tending to show that he was defendant's agent.

For the error in admitting this evidence, the judgment of the court below will be

REVERSED.

67 352
112 594

THE STATE V. CROSBY.

1. **Practice:** CORRECTION OF RECORD AFTER TERM ON CONFLICTING AFFIDAVITS: DISCRETION OF TRIAL COURT. It is doubtful whether a court should correct its record, after the adjournment of the term, upon affidavits, unaided by anything in the record or in the recollection of the judge which tends to corroborate the affidavits; but a refusal in such case to make the correction sought, where the affidavits are conflicting, will not be reversed on appeal. It is doubtful, indeed, whether this court ought ever to interfere in such cases, unless there is record evidence which shows that there is a mistake in the record which justice requires should be corrected.

Appeal from Cerro Gordo District Court.

FRIDAY, OCTOBER 23.

THE defendant filed a motion to correct the record, which was overruled, and he appeals.

A. H. Cummings, and *Blythe & Markley*, for appellant.

A. J. Baker, Attorney-general, for the State.

SEEVERS, J.—The defendant was indicted for a nuisance. He pleaded not guilty, and afterwards, on the twenty-second day of March, 1884, the record recites “that the defendant appears by A. H. Cummings, his attorney, and is present in person, and withdraws his plea of not guilty, and now in person pleads that he is guilty of the crime of nuisance, as charged in the indictment herein;” and thereafter, on the twenty-fourth day of said month, judgment was pronounced and entered of record. At the next term, before the record of the prior term had been signed, and on November 24, 1884, the defendant moved the court to amend the record so as to show that he did not personally appear and plead guilty. In support of the motion several affidavits were filed, which, with the exception of the affidavit of the defendant, are of a negative character. The several affidavits state in substance that the defendant was not present, and did not personally plead guilty to their knowledge. The defendant testifies that he was not present, and did not so plead. There is one counter-affidavit, which shows that Mr. Cummins appeared for defendant and intimated a desire to enter a plea of guilty; “and thereupon the court remarked that the defendant must be personally present to make that plea, and that Mr. Cummings answered that he would have him come in in the course of the morning; that in a few minutes afterwards this affiant observed that said Warren Crosby was personally present in the court-room.”

Under section 178 of the Code, the district court had authority to make the desired correction of the record, so as to make it conform to the facts. Before doing so the court

The State v. Crosby.

must have become satisfied that a mistake had been made. Conceding that under the statute the court has the power to correct its record after the term, and before it is signed, it is evident that it should not do so unless it clearly and beyond cavil appears that the correction should be made. There should be no doubt as to the existence of the mistake. Except for the purpose of correcting some mistake, the record, at least after the adjournment of the term, is an absolute verity in all courts, including the court making the record. To our minds it is doubtful whether a court should correct its record, after the adjournment of the term, upon affidavits, unaided by anything in the record or within the recollection of the judge which tends to corroborate the fact stated in the affidavits. It is evident, therefore, if the court below, upon motion, after the adjournment of the term at which the record is made, refuses to correct it upon parol evidence only, we should not interfere, for many reasons which might be stated; but one is sufficient, and that is, as the court has found that no mistake was made, we cannot, under the evidence in this case, say that the court in this respect erred. Indeed, we incline to think that the conclusion of the court below in a case of this character should be regarded as conclusive on this court, unless, possibly, there is record evidence which supports the claim that there is a mistake in the record which justice requires should be corrected.

AFFIRMED.

DAVIS' SONS v. ROBINSON.

1. **Instruction: ASSUMPTION OF DEFENSE NOT PLEADED: DEFENSE NOT SUPPLEMENTED BY ALLEGATIONS IN COUNTER-CLAIM.** An instruction based upon the theory that a certain defense was set up in the answer, which was not in fact set up, unless the defensive portion of the answer be supplemented by allegations contained in other divisions stating counter-claims, *held* erroneous; as each affirmative defense must be stated in a distinct division of the answer, and must be sufficient in itself. Code, § 2657.
2. **Sale of Machine: WARRANTY: WAIVER OF CONDITIONS OF: EXAMPLE.** A party who sells upon a conditional warranty may waive such of the conditions as were intended for his benefit. Accordingly, where plaintiffs sold to defendant a machine warranted to do good work, but with a provision that, if it failed on trial, defendant should give them notice thereof, and of the *nature of the defects, in writing*, and afford them an opportunity to repair or remove the defects; but they responded to a notice by *telegraph*, and sent an agent to fix the machine, *held* that they thereby waived their right to object to the notice as not being in writing, and as not being as full and formal as they were entitled to under the contract. *Wendall v. Osborne*, 63 Iowa, 99, distinguished.
3. **Principal and Agent: POWER OF AGENT TO BIND PRINCIPAL LIMITED TO BUSINESS IN HAND: EXAMPLE.** Where the business about which an agent was employed related solely to the examination and repair of a machine which his principals had sold to defendant, under an agreement that, if they failed to make it do good work, they would replace it with a new machine, *held* that the agent could not bind his principals by directing a different disposition of the machine, upon its failure, from that provided for in the contract, nor by his statement that they were unable to furnish a new machine.
4. **Evidence: AUTHORSHIP OF LETTERS WRITTEN WITH TYPE-WRITER.** Letters written with a type-writer and received by defendant through the mail, and purporting to be answers to letters written by him to plaintiffs, were admissible in evidence against plaintiffs without further proof that they were written by them.
5. **Sale of Machine: WARRANTY: WAIVER OF BY FAILURE TO PERFORM CONDITION.** The contract in question provided that if the defendant did not make full settlement for the machine when delivered to him he would thereby waive the warranty. By another provision of the contract, defendant agreed, upon the delivery of the machine, to make certain notes for a part of the purchase price, and to pay *in cash, in an old machine*, \$150. *Held* that by failing to deliver the old machine, as

87	355
87	425
87	355
94	148
87	355
96	517
100	139
87	355
111	536
87	355
128	607
87	355
133	664
87	355
139	506

Davis' Sons v. Robinson.

per contract, at the time he received the new one, defendant forfeited his rights under the warranty.

Appeal from Buchanan Circuit Court.

FRIDAY, OCTOBER 23.

PLAINTIFFS brought this action to recover the value of a threshing-machine, which they allege defendant agreed to deliver to them as part payment for a machine which they sold and delivered to him. They allege that in July, 1883, they sold and delivered to defendant a threshing-machine for the price of \$650, and that they agreed to accept, and defendant agreed to deliver, in payment of \$150 of the amount, an old threshing-machine then owned by him; and that he had refused on demand to deliver said machine.

Defendant admits that he purchased the machine from plaintiffs on the terms alleged in the petition, and that they demanded the delivery of the old machine, and that he refused to deliver the same. He also pleaded a counter-claim on account of the alleged failure of the warranty of the machine bought by him of plaintiffs, also on account of the wrongful suing out by plaintiffs of a writ of attachment in the cause. There was a verdict and judgment for defendant. Plaintiffs appeal.

Charles E. Ransier, for appellants.

H. W. Holman and *E. E. Hasner*, for appellee.

REED, J.—The machine sold by plaintiffs to defendant was purchased and sold on the following warranty and agreement:

“ * * * That it is well made, of good materials, and with proper management is capable of doing first-class work; that the purchaser shall have three days to give it a fair trial, and, if it should not work well, written notice, stating wherein it fails, is to be given to the agent from whom it is received, and to John S. Davis' Sons, Davenport, Iowa,

and reasonable time allowed to get to it and remedy the defects, if any, (the purchaser rendering necessary friendly assistance,) when, if it cannot be made to do good work, it shall be returned to the place where received, and a new machine given in its place, or the notes and money will be refunded. Continued possession of the machine shall be evidence of satisfaction; it being understood and agreed that, if the purchaser does not make full settlement with cash or approved notes for the machine upon its delivery to him, he thereby waives all claims under this warranty. (No agent has authority to change the above warranty.)"

The contract also provides that defendant will pay \$650 for the machine, as follows: "Cash, old machine, \$150; note due December 1, 1883, \$200; note due December 1, 1884, \$200; note due December 1, 1885, \$100." Also, that said notes shall be secured by a chattel mortgage on the machine. When defendant received the machine, he executed and delivered the notes and mortgage provided for in the contract. The machine did not work in a satisfactory manner, and defendant verbally notified the agent from whom he received it of the fact, and the agent telegraphed to plaintiffs asking them to send a man to fix the machine. Defendant also telegraphed them making the same request. Neither of these notices to plaintiffs informed them wherein the machine failed. They, however, in the course of a few days, sent a man to defendant's place who undertook to run the machine; defendant furnishing the necessary help, also furnishing grain to be threshed. But he was not able on that day to make it work in a satisfactory manner, and there is evidence tending to prove that he declared that he could not make it do good work, and that he directed defendant to stack it up on his place and let it remain there until he heard from plaintiffs. Also, that he stated that he would inform plaintiffs of the failure of the machine, and would endeavor to procure and return to defendant the notes which he gave for the machine. This attempt of the agent to make the

Davis' Sons v. Robinson.

machine work was made on a Saturday, and on the evening of that day he returned to Davenport, (where plaintiffs' place of business is situated,) and on the following Monday he went again to defendant's place, taking with him certain attachments which he proposed to place on the machine, and then make another trial of it. But defendant declined to render any further assistance in the effort to make it work, or to retain it on any conditions.

There is also evidence tending to show that defendant, on the first day on which the agent attempted to make the machine work, offered to accept another machine if plaintiffs would at once ship it to him at their cost, but that the agent then informed him that plaintiffs had no machine of the size of the one in question. The machine remained on defendant's place for about two months after the trial, when defendant hauled it to the railroad station where he had received it, and notified plaintiffs of what he had done with it, and demanded the return of his notes. Plaintiffs, however, had transferred the notes to a third party, who afterwards foreclosed the chattel mortgage given for their security, realizing enough on the sale of the machine under the foreclosure proceedings to satisfy the note first falling due, and credit \$53.78 on one of the other notes.

I. Plaintiffs asked the court to instruct the jury that under the pleadings they were entitled to recover the price of the old machine, with interest thereon from the date of defendant's refusal to deliver it. The court added the following to the instruction as asked: "Unless you find under the evidence and these instructions that the entire consideration for said old machine had failed before the demand for the delivery of said machine was made by plaintiff;" and with this modification gave it to the jury. Plaintiffs assign the giving of this modification as error. Their position is that the modification is not applicable to the issues as made by the pleadings. As indicated in the statement of the case,

1. INSTRUCTION: assumption of defense not pleaded; defense not supplemented by allegations in counter-claim.

plaintiffs sought to recover the value of the old machine. They set out in their petition the contract for the sale by them of the new machine to defendant, including the warranty.

In the first division of his answer, defendant admitted the making of this contract, and admitted that plaintiffs had demanded the delivery of the old machine, and that he had refused to deliver it, but alleged that "such demand and refusal was after an entire failure of the conditions of the warranty of the machine purchased from plaintiffs by defendant." The language here quoted contains the only matter attempted to be pleaded as a defense to plaintiffs' demand. The paragraph contains no statement of the conditions of the warranty, nor does it contain any specific statement of the failure of the warranty. It, however, admits the making of the contract as alleged in the petition, and it contains the general allegation that there was an entire failure of the conditions of the warranty. As plaintiffs made no question of the sufficiency of this pleading before the trial, if the failure of the warranty alone constituted a defense to their demand, they would not now be permitted to allege that such failure of warranty was not sufficiently pleaded. But the mere failure of the warranty does not constitute a defense. The contract provides that if the machine shall fail to comply with the warranty, plaintiffs shall be notified of this failure and have an opportunity to remedy the defects, and that, if they are not able to make it comply with the warranty, they shall either furnish another machine or the sale shall be rescinded. Unless these provisions of the contract have been complied with or waived, defendant has no defense against the demand asserted by plaintiffs. *King v. Towsley*, 64 Iowa, 75. But there was no attempt in this paragraph of the answer to plead either a compliance with or waiver of them. In the other divisions of the answer are pleaded the several counter-claims set up by defendant. A failure of the warranty and rescission of the contract are

pleaded in those paragraphs. But the allegations of those divisions cannot be considered in aid of the defense attempted to be pleaded. Each affirmative defense must be stated in a distinct division of the answer, and must be sufficient in itself. Code, § 2657. We think, therefore, that plaintiffs were entitled on the pleadings to recover the price of the old machine, and that the circuit court erred in adding the qualification to the instruction.

II. The circuit court instructed the jury, in effect, that plaintiffs might waive those provisions of the contract which were intended for their benefit, and that if, in compliance with defendant's request by telegraph, they sent an agent to fix the machine, they thereby dispensed with that provision which requires that written notice of the failure of the machine to work in a satisfactory manner, and the respect in which it fails, be given them; and that if plaintiffs or their authorized agent informed defendant, after they had failed to make the machine work in a satisfactory manner, that they had no other machine of the same make and size which they could furnish him, he had the right at once, and without first making a demand that they furnish him with another machine, to rescind the sale and demand the return of the notes which he had given them. The giving of these instructions is assigned as error.

We think the holding that plaintiffs had dispensed with the provision of the contract which requires that a written notice should be given them of the failure of the machine to work in a satisfactory manner is clearly correct. The provision was for their benefit. They are manufacturers of threshing-machines, and their object in inserting the provision in the contract doubtless was to secure to themselves such information with reference to the defects in the machine as would enable them to make provision at their manufactory for its repair before sending out an agent to make the repairs. When they were advised that the machine was not working

2. SALE of
machine:
warranty:
waiver of
conditions of:
example.

satisfactorily, they at once notified defendant that they would send a man to fix it; and, without requesting or receiving any information as to the nature of the defects, they sent an agent to examine it, and directed him to put it in condition to do good work, if he was able to do so. They doubtless were entitled to a reasonable time after the agent examined the machine, and ascertained what were its defects, in which to procure the necessary appliances, and make the necessary repairs or alterations. But, having acted upon the notice which was given them, they cannot now be permitted to assert that it was not as full or formal a notice as under the contract they were entitled to receive. The case, in this respect, is very different from *Wendall v. Osborne*, 63 Iowa, 99, cited and relied on by appellants. In that case, notice of defects in the machine was required to be given within a specified time, and it was provided in the contract that keeping the machine until the expiration of that time without giving notice of defects should be deemed conclusive evidence that it complied with the warranty; and it was held that the vendor did not waive this provision of the contract by examining the machine, and attempting to correct the defects in its construction, upon a request or notice given after the expiration of the time provided in the contract for the giving of such notice.

The ground of the holding is that, at the time the notice was given, the warranty, in contemplation of law, under its terms, had been fully performed, and the rights and liabilities of the parties had been fully settled. And, as the notice which had been given, and the acts which had been done by the vendor, were matters entirely outside of the contract, they could not have effect in determining the rights of the parties. But in the present case the warranty had not been performed when the notice was given. The rights and liabilities of the parties were not then settled, but plaintiffs were bound either to correct the defects in the machine, or permit the contract to be rescinded. It is very apparent that the rule

applied in that case can have no application to this state of facts.

III. As an abstract proposition, the holding that if plaintiffs failed to make the machine do good work, and they or their authorized agent informed defendant that they had no other machine which they could give him in its place, he had the right at once to rescind the contract and demand the return of his notes, is undoubtedly correct. We think, however, that the court was not warranted by the evidence in giving that instruction. Under the provisions of the contract, plaintiffs had the option, if they failed to make the machine comply with the warranty, to furnish another machine in its place. Unless this provision was dispensed with, or they were unable to perform it, defendant could not rescind the contract without first giving them an opportunity to furnish another machine. *Pitt's Sons' Manuf'g Co. v. Spitsnogle*, 54 Iowa, 36. The only evidence of a waiver by plaintiffs of the provision, or of their inability to perform it, is the alleged direction of the agent to defendant to stack the machine up on his place, and let it remain there until he should hear from plaintiffs; and his statement that they had no other machine of that size and make which they could furnish defendant. But it is shown by the testimony, without dispute or contradiction, that the agent had no power or authority to waive any of the provisions of the contract. And it is equally clear that his statement was not admissible as an admission by plaintiffs that they were not able to perform the condition of the contract. The business about which he was employed at the time related to the examination and repair of the machine, and while his statements made at the time with reference to that subject would be admissible against his principal, he clearly had no power to bind them by his statements with reference to other matters. We think, therefore, that the court erred in giving said instruction. Also that it erred in giving the twenty-third

3. PRINCIPAL
and agent:
power of
agent to bind
principal limited to business in hand:
example.

instruction, in which it submitted to the jury the question whether the agent had the authority to direct a different disposition of the machine, after the alleged failure, from that provided for in the contract. There was no evidence tending to prove that he had such authority.

IV. The court, against plaintiffs' objection, admitted in evidence certain letters which purport to be written by plaintiffs to defendant, and which relate to the subject of the controversy. They were written with a type-writer, and there was no direct evidence that they were written by plaintiffs or by their direction. It is shown, however, that defendant received them through the mail, and they purport to be in answer to letters which he had written to plaintiffs. They were admissible without further proof than this that they were written by plaintiffs. Greenl. Ev., § 573a.

V. Plaintiffs asked the court to instruct the jury that by his failure to deliver the old machine when he received the new one defendant had waived all claims under the warranty, and they assign the refusal of the court to give this instruction as error. The contract provides that "if the purchaser does not make full settlement with cash or approved notes for the machine upon its delivery to him, he thereby waives all claims under this warranty." By another provision of the contract defendant agreed to deliver the old machine in payment of \$150 of the price he was to pay for the new machine. This is spoken of in the contract as a cash payment. When all of the provisions of the contract are considered, there can be no doubt but that defendant's undertaking was that he would deliver the old machine when he should receive the new one. He received the new machine at Urbanna, and he testified that the understanding was that he should haul the old machine to that place and there deliver it. He gave his notes for the remainder of the purchase price of the new machine at the time he received it, but neglected to deliver

4. EVIDENCE:
authorship of
letters written
with type-
writer.

5. SALK OF
machine:
warranty:
waiver of by
failure to per-
form condi-
tion.

Atkinson v. Atkinson.

the old one. It cannot be said that he made full settlement for the machine upon its delivery, and his express agreement was that by a failure to do that he would waive all claims under the warranty. We think, therefore, that the instruction should have been given. For the errors pointed out the judgment will be reversed, and the cause remanded for a new trial.

REVERSED.

ATKINSON V. ATKINSON.

1. **Husband and Wife: DIVORCE: DESERTION: EVIDENCE INSUFFICIENT.** Action for a divorce on the ground of desertion. The circuit court granted the divorce, but upon a review of the evidence, (see opinion,) held that it was not sufficient to establish a willful desertion for the two years next preceding the action, and the decree is reversed and the petition dismissed.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 23.

THIS is an action for divorce upon the alleged ground that the defendant willfully deserted the plaintiff, and continued to absent herself from him, without any reasonable cause for the period of two years next preceding the commencement of the suit. There was an answer denying the alleged desertion, and a cross-bill for a divorce upon account of cruel and inhuman treatment. The circuit court granted a divorce upon the petition of the plaintiff, and dismissed the cross-petition, and decreed that the plaintiff should pay to the defendant a certain sum of money as alimony. Defendant appeals.

Wright, Cummins & Wright, for appellant.

Nourse & Kauffman for appellee.

ROTHROCK, J.—I. The parties were married in the state of California in the year 1877. Before their marriage the plaintiff was a resident of the city of Des Moines, in this state, and the defendant resided with her parents in California. Soon after the marriage the parties took up their residence in the city of Des Moines. The father of the defendant presented her with a dwelling-house in which they lived part of the time, and at other times they resided with the family of the plaintiff's mother, or in rooms to themselves in her house. Two children were born to the parties, both of whom are still living. It is not claimed by the plaintiff that the defendant was guilty of any conduct which could be made the foundation of a separation or divorce until the thirtieth day of June, 1881. On that day the defendant and the plaintiff's mother had an altercation in which the defendant claims that she was inhumanly assaulted and beaten. The parties were then living in rooms in the plaintiff's mother's house. That the defendant was assaulted by plaintiff's mother on that occasion is not disputed. The mother admitted in her testimony upon the trial that she struck the defendant "across the jaw with a hair-brush." The defendant immediately took her two children and left the house, went to the house of a neighbor, and sent for her husband. From that time until the seventh of July, 1881, she and her two children remained at the house of Mrs. Durant, a neighbor and friend. On the seventh day of July, 1881, she left Des Moines with her two children, and went to her father's home in San Francisco, where she has ever since remained. This action was commenced on the third day of July, 1883, and to justify a decree of divorce on the ground of willful desertion it is necessary that the plaintiff should show that he was willfully deserted by the defendant on the third day of July, 1881, four days before the defendant's departure for California.

The evidence shows quite satisfactorily to our minds, as we read it in the abstract and amended abstract, that for some

Atkinson v. Atkinson.

time prior to the thirtieth of June the defendant had been contemplating a visit to California with her children. In anticipation of this visit a part of the household furniture was sold and housekeeping was discontinued, or was carried on without a full equipment of household goods. It does not appear that the defendant at any time abandoned the projected visit. On the thirtieth day of June she announced her purpose to go to California as soon as she could do so. The plaintiff objected to this and refused to stay at Mrs. Durant's house, and insisted in treating the separation as a desertion, and on the fifth day of July, 1881, before the defendant left Des Moines with her children, he sent the following telegram to the defendant's father at San Francisco: "Lizzie left my bed and board July 1st. Answer at once."

The material, and indeed the pivotal, question in the case is, did the defendant willfully desert the plaintiff when she went to the house of Mrs. Durant with the avowed purpose of going to California as soon as convenient? Or, in other words, did she then intend to separate herself permanently from the plaintiff? The evidence on this question is quite voluminous, and we cannot even give an abstract of it in this opinion. It consists of a large number of letters written by the parties to each other, and letters from the father of the defendant to the plaintiff, as well as the acts and conduct of the parties from the time of their marriage down to the time of the departure of the defendant for San Francisco on the seventh day of July, 1881. From a careful examination of all this evidence, our conclusion is that the finding should be that defendant did not contemplate a final separation until in December, 1881. When she went to California, the husband furnished her with \$200 to defray the expenses of her journey. The mere fact of furnishing the money does not necessarily show that he connived at a separation, nor that defendant went away with his consent. But the \$200 was not sufficient to defray the expenses of a return to Des Moines, and the plaintiff does not claim that he transmitted any money to her to enable

her to return. If he had done this, and she had refused, after a reasonable and proper time for a visit, to rejoin him at Des Moines, the finding that she intended to desert him when she went away might possibly be inferred. If it be conceded that the plaintiff objected to the defendant's making the visit, and insisted on regarding her leaving him as a desertion, as indicated by his telegram to her father, this state of facts does not necessarily prove a desertion. In these latter days wives sometimes insist on making protracted visits and absenting themselves from home for travel and recreation even without the cordial assent of their husbands, and for a reasonable degree of freedom in these respects husbands cannot well construe the acts of their wives as amounting to desertion.

We have said that a full statement of the facts disclosed in the voluminous correspondence between the parties is not practicable in this opinion. To the end, however, that the feelings of defendant towards the plaintiff may be better understood, we make the following extract from her letter to him of November 19, 1881:

"You say in your letter that you will make your little family happy, and get us a good comfortable home all to ourselves, where your relatives will not or shall not make trouble between us again. If you mean what you say, and are not doing it to deceive me, and you love your family and intend to do what is right towards us,—but if you intend to allow your folks to influence you against me and to abuse me, then tell me so, and don't fool me; but if you do as you say you will, and are not doing it to deceive me, then you may come for me or wait until our dear baby gets his teeth through, for he is liable to go into more spasms,—you know it is harder for boys to cut teeth than girls,—and send me the money to come by express,—sleeping cars. Now, write and tell me what you want to do. With a kiss from the children and me, I hope by the time you receive these few lines dear baby will

Atkinson v. Atkinson.

be well enough to be up and play with his dear little sister, Edna, like he used to.

“From your loving and affectionate wife.

“LIZZIE ATKINSON.”

If the plaintiff wished to put his wife upon the defensive and treat her absence as desertion, he should have either replied to this letter in person and offered to bring his family back to Des Moines, or he ought to have sent her sufficient money to pay the passage of the family from San Francisco to Des Moines. He did neither the one nor the other, but in his answer to this letter, dated November 28, 1881, he reminded her that when she left Des Moines she had \$200, and inquired why it was necessary to send her more money. The plaintiff was abundantly able to furnish the money for the return of his family. He makes his own estimate of the value of his property by stating in his testimony that he would willingly sell all he had for \$10,000, and he must have known that the \$200 was exhausted in the journey to San Francisco, and necessary expenses there. It is true that it appears from all the letters of the defendant that she very much desired that the plaintiff should remove to California, or from the city of Des Moines, so as to be away from his mother's family. But when she finally consented to return to Des Moines upon the condition that they should make a home where they could live without molestation from his relatives, we do not think the conditions were unreasonable under all the facts in the case. And, indeed, this is just what the plaintiff claims he offered to do before the defendant left for California. In our opinion the court was correct in dismissing the defendant's cross-petition for divorce, and we think the plaintiff's petition should also be dismissed, and it is so ordered.

REVERSED.

 Toner, Ex'r, v. Collins et al.

TONER, EX'R, v. COLLINS ET AL.

BRAZILL v. TONER ET AL.

 67 369
 87 619

1. **Will: DEVISE TO EXECUTORS IN TRUST FOR CHILDREN: CONSTRUCTION OF CONDITION—WHETHER CONDITION PRECEDENT TO TITLE IN CHILDREN, OR CONDITION FOR TERMINATION OF TRUST.** The testator bequeathed to his executors, in trust for his children, certain real estate, with the following provision, among others: "My said executors shall have the management and control of said property by me devised to them in trust for my said children, and they are to have the control and management thereof until they shall get married; and when any of my said children shall marry, with the consent of said executors, any worthy person, then the part or portion of property herein devised, or the proceeds thereof, * * * shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof, so as to vest the absolute title in said legatee." *Held* that the marrying of a child with the consent of the executors was not a condition precedent to the vesting in him or her of an interest in the estate, but only a condition for the termination of the trust as to one so marrying; and that the will, considered as a whole, vested in the children, upon the death of the testator, a present equitable interest in the estate. Consequently, where one of the daughters died at the age of twenty-two, unmarried, and bequeathed to B. all her property, personal and real, and all her interest in her father's estate, either as heir or devisee under his will, *held* that her death terminated the trust as to the property bequeathed to the executors for her use, and they were properly decreed by the court below to convey the legal title thereof to B.
2. **Estates of Decedents: REQUEST OF REAL ESTATE IN TRUST: SUBSEQUENT MORTGAGE OF REAL ESTATE: PAYMENT OUT OF GENERAL ASSETS.** Where a testator, after the execution of his will, in which he bequeaths certain real estate to his executors in trust for each of his children, mortgages a portion of such real estate, the mortgagee may insist upon the sale of the mortgaged premises to pay the debt, but a legatee of the mortgaged property may insist, as against the executor and his co-legatees, upon the payment of the debt out of the general assets of the estate.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 23.

MYLES COLLINS died at the city of Des Moines on the first
 VOL. LXVII—24

Toner, Ex'r, v. Collins et al.

day of November, 1880. He left surviving him three children, Myles H. and Lizzie Collins and Katie Toner. On the third of March preceding his death he executed a will, which was duly admitted to probate on the twenty-second of November, 1880. At the date of the execution of the will his children were all adults, and were unmarried. But between that date and his death his daughter Katie was married to Peter Toner, who is now the executor of the will. By the will he disposed of all his real estate, and Thomas Flynn, Michael Kenedy and Peter Toner are named therein as executors. None of these, however, except Peter Toner, qualified, and he is now the sole executor of the estate. The several bequests of the will are made to the executors in trust for said children; and it is provided therein that the executors shall have the management and control of the property devised to them until the children shall marry, and that, when any of said children shall marry with the consent of said executors, the portion of property devised for his or her benefit, or the proceeds thereof, shall become his or her property, and the executors are required to make the conveyances thereof necessary to vest the absolute title in the legatee. On the nineteenth day of January, 1882, Lizzie Collins died. She was twenty-two years old at the time of her death, was unmarried, and had never asked the consent of either of the persons named as executors in her father's will to her marriage. Before her death she executed a will, by which she bequeathed to John F. Brazill all of her property, personal and real, and all of her interest and right in her father's estate, either as heir or devisee under his will. This will has also been admitted to probate. Peter Toner, as executor of the will of Myles Collins, filed a petition in the circuit court, in which he alleged that a controversy had arisen as to the effect of the will, and he prayed the court to interpret it, and direct him how to proceed with the distribution of the property, and especially to instruct him whether or not said John F. Brazill is entitled to the share of Lizzie Collins in the estate. Brazill also

Toner, Ex'r, v. Collins et al.

brought an action against Toner and his wife, in which he prayed that he be adjudged to be the owner of the property devised to the executors in trust for Lizzie Collins, and that the executor be required to convey the same to him. Myles H. Collins intervened in this action, and prayed that the executor be required to convey to him the portion of the property which, by his father's will, was bequeathed to the executors in trust for him, on the ground that the provision of the will which makes his marriage with the consent of the executors a condition of the devise is void as against public policy, being in restraint of marriage. He also alleges that certain debts which have been established against the estate of his father are a lien upon the real estate devised for his benefit, and he prays that the executor be directed to pay the same out of the general estate. The actions were consolidated in the circuit court, and the court adjudged that Brazill was the owner of the property devised by Myles Collins to his executors in trust for Lizzie Collins, and ordered that the executor convey the same to him. It also adjudged that the executor was entitled to the control and management of the property devised in trust for Myles H. Collins. It also directed the executor to sell an amount of the property of the estate sufficient for the payment of the debts which are a lien on the property devised to Myles H. Collins. From this judgment all of the parties have appealed.

Wright, Cummins & Wright, for Peter Toner and wife.

Marcus Kavanagh, Jr., and *Sickmon, Long & Parrott*,
for John F. Brazill and Myles H. Collins.

REED, J.—The provisions of the will of Myles Collins which it is necessary to consider in determining the ques-

Toner, Ex'r, v. Collins et al.

1. WILL: devise to executor in trust for children: construction of condition—whether condition precedent to title in children, or condition for termination of trust.

tions arising in the case are as follows: "*First.* I give, devise and bequeath to my executors, Thomas Flynn, Michael Kenedy and Peter Toner, all and singular my real estate owned by me, in trust, however, only for the express purpose hereinafter set forth: I give, devise and bequeath to my said executors in trust for my beloved son Myles Henry Collins the following described property: lot number six (6) in block A of Commissioners addition, now forming a part of the city of Des Moines.

"*Second.* I give and bequeath to my said executors, in trust for my beloved daughters Lizzie Collins and Katie Collins, to each an undivided half of the following premises: The east half of lots three (3) and four (4) in block three (3) of West Des Moines, and a fractional part of lot number three (3) in block number twenty (20) of H. M. Hoxie's addition, now incorporated in and forming a part of the city of Des Moines; also the south sixteen (16) feet of lot number one (1) and all of lot number two (2) in block one of P. M. Scott's addition, now incorporated in and forming a part of the city of Des Moines. * * *

"My said executors shall have the management and control of said property by me devised to them in trust for my said children, and they are to have the control and management thereof until they shall get married; and when any of my said children shall marry with the consent of said executors any worthy person, then the part or portion of property herein devised, or the proceeds thereof, as shall be provided for hereafter, shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof so as to vest absolute title in said legatee. Should my said executors in their judgment deem it for the best interest of their wards to sell any of the wild land or the city property, they shall exercise that discretion applicable to their own affairs, and sell same, and the proceeds thereof they shall safely and profitably reinvest.

Or in case of sickness or other contingencies arising, so as to make it necessary in their judgment to sell or incumber any of the land or realty devised, they have the authority and right to do so, always, however, looking to the welfare and interest of their respective wards. In case any transfers are made as above contemplated, strict account shall be taken, and the party benefited thereby duly charged therewith."

The important question in the case is whether by this will a present estate in the property devised for their benefit is conferred upon the children of the testator. It is contended by counsel for the executor that the clause of the will, which provides that when any of said children shall marry with the consent of the executors the portion of the estate which is devised to the executors for the benefit of said child shall become his property, and be conveyed by the executors to him, creates a condition precedent to the vesting in him of any estate in the property so devised. It is conceded that, if this is the effect of the provision, the bequest for the benefit of Lizzie Collins must fail, and that the property covered by it falls into the general estate, to be disposed of as though no will had been made; for her death has rendered it impossible that the condition upon which the bequest depends should ever happen. If the intention of the testator was to be determined alone from the language of this clause of the will, the court would probably be compelled to give it the effect contended for by counsel, but it is a cardinal rule in the construction of wills that the purpose and intention of the testator is to be gathered from all of the provisions of the instrument. And we are of the opinion that, when the will in question is considered as a whole, it cannot be determined from its provisions that it was Myles Collins' intention to make the marriage of his children with consent of the executors a condition precedent to the vesting in them of an estate in the property devised to the executors for their use. The language of the various provisions of the instrument clearly evidences, we think, an intention by the

testator to make an absolute and final disposition of all of his real estate. The first clause of the will is a devise and bequest of all of his real estate to the executors in trust for the purposes thereafter set forth, and, by the clauses immediately following, specific portions of the property are devised to them in trust for each of the children. The bequests are absolute. That is, the property is bequeathed absolutely to the executors in trust for the legatees. The legal title is conferred upon the executors, and they are given certain powers, and charged with certain duties, with reference to the property. They have power at their discretion to sell the whole, or any portion of it, with a view to the reinvestment of the proceeds. And they may, in case of the sickness of either of the children of the testator, make provision for his support out of the property devised for his use. The executors, however, have no beneficial interest or estate in the property. They hold the legal title simply for the legatees, and the powers with which they are clothed, and the duties which are imposed upon them with reference to the property, are all to be exercised for the benefit of the legatees. There is no bequest over. The will makes no provision for the disposition of the property covered by any of the bequests in case of the failure of any of the children to marry with the consent of the executors, or in case of their marriage without such consent. Clearly, we think, it was not the intention of the testator to make such marriage a condition precedent to the vesting of a beneficial estate in the property in the legatees. But the provision with reference to their marriage was inserted in the will for an entirely different purpose. Having by the preceding provision created a trust estate of which the executors are the trustees and his legatees the *cestui que trusts*, the testator inserted the clause in question for the purpose of creating a condition on the happening of which the trust should terminate, and the legatees be entitled to be clothed with the legal estate and the right to the control and management of the property. We

conclude, therefore, that the said Lizzie Collins was the owner of an equitable and beneficial estate in the property devised by her father to the executors in trust for her, and by her will this estate is conferred upon said John F. Brazill. And, as the relation of trustee and *cestui que trust*, created between her and the executors by her father's will, terminated necessarily at her death, her legatee is now entitled to be vested with the legal title to the property.

II. The holding that the provision of the will with reference to the marriage of the legatees is a condition for the termination of the trust created by the will, and not a condition precedent to the vesting of the estate in the legatees, disposes of the claim of Myles H. Collins that said provision is void as against public policy, for the ground of that claim is that the marriage of the legatee with consent of the executors is a condition of the bequest.

III. The debts which the executor, by the judgment of the circuit court, is directed to pay out of the general estate were created after the execution of the will, and were secured by mortgage on the property devised to Myles H. Collins. While the creditor has the right to subject the mortgaged property to the payment of the debt, as between the legatees there is no such right. The debt as between them is a claim against the estate, and should be paid out of the general assets of the estate, and not out of the particular property mortgaged to secure it. The judgment in this respect is supported by *Sharpless v. Gregg*, 45 Iowa, 649.

AFFIRMED.

2. ESTATES of decedents: bequest of real estate in trust: subsequent mortgage of real estate: payment out of general assets.

Else et al. v. Kennedy.

ELSE ET AL. V. KENNEDY.

1. **Voluntary Conveyance: MISDESCRIPTION: REFUSAL OF EQUITY TO REFORM DEED AND QUIET TITLE.** Courts of equity will not assist the grantee in an imperfect conveyance, which is not supported by either a valuable or meritorious consideration, against either the grantor or his representatives. (See authorities cited in opinion.) And so, where defendant, to whom her mother owed no duty that she did not owe to her other children, procured from her mother, without consideration, a deed, alleged to have been intended as a conveyance of certain land owned by the mother, but which did not describe the land in question, and thus failed to operate as a legal conveyance of it, *held* that she (defendant) was not, after the death of the mother, entitled to a decree in equity, against the other heirs of her mother, reforming the deed so as to describe the land intended to be conveyed, as alleged, but that the other heirs were entitled to a decree quieting in them severally such interest in the land as they were entitled to by inheritance.

Appeal from Mahaska Circuit Court.

FRIDAY, OCTOBER 23.

PLAINTIFFS brought this action to quiet in each of them the title to one-sixth of a certain tract of land. They claim as heirs at law of Elizabeth Else, deceased, who was their mother, and they allege that defendant, who is their sister, claims the whole of the premises under a certain deed to which their mother's name was signed before her death, and which has been placed of record since she died. They allege that said deed was obtained by defendant without consideration and by undue influence; that it is void for uncertainty in the description of the property conveyed; and it was never executed and delivered by their mother, but that her signature was attached thereto when she was in a dying condition, and when she was incapable of understanding or executing a contract; and that after her signature was attached to said deed it was altered in a material respect by defendant's attorney with her approval, but without the knowledge or consent of said Elizabeth Else. Defendant denies the allegations that

Else et al. v. Kennedy.

she obtained said deed by undue influence, and that it was not executed and delivered by Elizabeth Else, and that it was altered after its execution without the knowledge or consent of their mother. And in a cross-petition she prays that the description of the property contained in said deed be so reformed and corrected as to make the instrument describe the property intended to be conveyed by it, and that her title to the property be quieted. The circuit court dismissed both petitions, and both parties appeal.

John F. Lacey, for plaintiffs.

Geo. W. Lafferty, for defendant.

REED, J.—Elizabeth Else died on the twenty-second of August, 1882. The deed in question was signed on the day before her death. The property which it purported to convey at the time her signature was attached to it was the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 19, in township 76, range 16. The property which she actually owned at the time is lot 1, in S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 24, township 75, range 16, and 12 feet in width off of the south side of lot 2, in the same subdivision of said section. The notary public who wrote the instrument discovered on the same day on which it was signed that a mistake had been made in the description of the property, and undertook to correct the same. He struck out the description which was written in the deed when Mrs. Else's signature was attached to it, and wrote in lieu of it the following description: "N. pt. lot one, (1,) S. E., N. E., section 24, township 75, range 16. Twelve ft. off S. pt. lot 2, S. E., N. E., section 24, township 75, range 16." He informed defendant of this alteration on the day on which it was made, but Mrs. Else's attention was not called to the matter. Mrs. Else was taken sick thirty-six hours before the deed was signed, but her condition had been regarded as dangerous only for six or eight hours before the signing of the

deed. Her disease was cholera morbus, and she was very much prostrated at the time. He physician describes her as being in a condition of collapse, and she was under the influence of an opiate which the physicians had administered to relieve her of the cramping caused by the disease. The physician testified that he visited her on the day on which her signature was attached to the instrument, both before and after it was signed, and that, while her mind did not act vigorously, and, except when spoken to, she paid but little attention to what was going on about her, yet, when she was spoken to, she answered responsively and intelligently to such questions as were asked her. The notary public who wrote the deed testified that he explained to her the character of the instrument, and the property to which it related, and that, while she did not speak, she indicated by a nod of the head that she understood him, and comprehended the character of the instrument, and that when he asked her whether the deed was her voluntary act she indicated her assent in the same manner. When the signature was attached she took the pen in her hand, and by the assistance of the notary, who steadied and guided her hand, wrote her name.

The testimony of other witnesses who were present at the time of the transaction tends strongly to show that her condition at the time was such that it is hardly possible that she could have comprehended what was being done. She acquired the property in question by devise from her husband, who died in 1879. She also acquired other real estate in the same manner, which she had sold in the mean time, and she paid a portion of the money derived from this sale to four of her children, taking from each a written agreement to pay her ten per cent interest per annum on the amount so advanced, and which provided that if the interest should be paid annually when due the principal should at her death be treated as an advancement. Defendant and Mrs. Mattox, one of the plaintiffs, did not receive any money under this arrangement, but the evidence shows that their mother retained

Else et al. v. Kennedy.

for each of them the same amount which was advanced to each of the other children, which she desired to advance to them upon the same terms, but which they had never accepted. It is shown that on several occasions, one or two of which were but a few days before her death, she expressed the wish that upon her death her children should share equally in her property. It is also shown that on other occasions she said she expected to live with defendant during the remainder of her life, and that it was her intention that defendant should receive the property in question. There is no evidence, however, of any contract or agreement between her and defendant that the latter should care for or support her, or that the property should be given to her in consideration of any services she should render her. For the greater part of the time after the death of her husband, however, Mrs. Else and defendant did reside together. During a portion of the time they lived in the property in question, which, before the death of the husband and father, was the family homestead. At other times they lived in rented property, and at the time of Mrs. Else's death they lived in rented rooms. Mrs. Else was about seventy-four years of age at the time of her death, but before she was taken with her last sickness she had always enjoyed good health, and was vigorous and active, and gave attention to her affairs. The deed was prepared by the notary at defendant's request, and there is no competent evidence that the matter had been spoken of by her mother at any time after she was taken sick.

If it should be conceded that at the time her signature was attached to the deed Mrs. Else was mentally capable of entering into a contract, or of making a disposition of her property, and that the notary had authority, when he discovered that the instrument as written did not describe the property intended to be conveyed, to alter it by striking out that description and inserting the one intended, it would still be apparent that the deed as altered does not vest defendant with

Else et al. v. Kennedy.

the title to the property in question. The description, "N. pt. lot 1," and "12 ft. off S. pt. lot 2," does not describe any property with certainty. It is void for uncertainty. The question presented by the case, then, is whether defendant is now entitled to be adjudged the equitable owner of the property, and whether she is entitled to have the deed so reformed as to make it evidence in her hands of title to the property. It is rendered clear by the evidence that the deed is not supported by any valuable consideration. It is clear, also, that Mrs. Else intended (if she was capable of forming any intent with reference to the transaction) to convey the property in question. The deed, then, was an imperfect voluntary conveyance, and it is well settled that courts of equity will not assist the grantee in an imperfect conveyance, which is not supported by either a valuable or meritorious consideration against either the grantor or his representatives. See Story, Eq. Jur., § 793*b*; *Bunn v. Winthrop*, 1 Johns. Ch., 329; *Minturn v. Seymour*, 4 Id., 497; *Haines v. Huines*, 6 Md., 435; *Shepherd v. Bevin*, 9 Gill., 32; *Holland v. Hensley*, 4 Iowa, 222; 1 Lead. Cas. Eq., (3d Amer. Ed.,) 324.

It is said, however, that the deed was executed for the purpose of making provision for a child, and that this constitutes a meritorious consideration which will support the conveyance. Cases are not wanting which hold that the natural and moral obligation which is imposed upon a husband and father to make provision for his wife and children constitutes a consideration which will support a conveyance made by him for the purpose of making such provisions against mere volunteers under him. The cases cited above from 1 and 4 Johns. Ch. hold this doctrine. See, also, Story, Eq. Jur., § 793*d*. But we are of the opinion that the facts of this case do not bring it within the principle of this exception. Mrs. Else was under no natural or moral obligation to make any greater or different provision for defendant than for her other

Eise et al. v. Kennedy.

children. For, as stated above, defendant was under no obligation to render her any special services, or give her any special care, and it does not appear that she had given her any such service or care. Each of her other children owed her the same duty to minister to her wants and contribute to her comfort which was due to her from defendant, and it does not appear that any of them had been wanting in this respect. And there was nothing in defendants condition or circumstances which rendered it necessary that special provision should be made for her support. It is not doubted that the mother had the right to make a greater provision for defendant than for her other children. And if her intention to make such provision had been fully carried out by the execution and delivery to defendant of a conveyance of the property, it is equally well settled that a court of equity would not have interfered on the application of the other children to set such conveyance aside on the ground alone that it was not supported by a consideration. But, as the deed which was executed did not operate as a conveyance of the property to defendant, and as the promise to make the conveyance is not supported by either a valuable or meritorious consideration, equity will not interfere or lend its aid to enforce it. In the case of *Stewart v. Brand*, 23 Iowa, 477, which is greatly relied upon by defendant, the defective voluntary conveyance was by a husband to his wife, and it was reformed by the court in an action by a third party against the husband. The holding in that case can be sustained on the ground that the conveyance was a provision for the wife, and the rights of third parties had attached, although the ground upon which it is placed is not stated in the opinion. We think, therefore, that the circuit court rightly held that defendant is not entitled to a judgment quieting the title to the property in her or reforming the deed. But we are also of the opinion that plaintiffs are entitled to judgment quieting in each of them the title to one-sixth of the property.

Eise et al. v. Kennedy.

On defendant's appeal the judgment will be affirmed. On plaintiffs' appeal it will be reversed, and the cause will be remanded, with directions to the circuit court to enter a judgment in harmony with this opinion; or, if defendants so elect, such judgment will be entered in this court.

REPORTS
 OF
 Cases in Law and Equity,
 DETERMINED IN THE
 SUPREME COURT
 OF
 THE STATE OF IOWA,
 AT
 DES MOINES, DECEMBER TERM, A. D. 1885,
 IN THE THIRTY-NINTH YEAR OF THE STATE.

PRESENT:

HON. JOSEPH M. BECK, CHIEF JUSTICE.	
" AUSTIN ADAMS.	
" WILLIAM H. SEEVERS,	}
" JOSEPH R. REED,	
" JAMES H. ROTHROCK.	
	JUDGES.

NAMES V. NAMES.

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90	96
90	250

1. **Adultery:** EVIDENCE OF: WHAT IS SUFFICIENT. Adultery is peculiarly a crime of darkness,—seldom capable of being proved by other than circumstantial evidence; and the evidence is held to be sufficient when the circumstances proved lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence. (*Inskip v. Inskip*, 6 Iowa, 204.) Accordingly, the evidence in this case (see opinion) held to establish the defendant's guilt in an action for divorce.

Names v. Names.

2. **Evidence: LETTERS TO PROVE LOCATION OF WRITER.** Letters shown to be in plaintiff's handwriting, and purporting to have been dated at A., are not, in the absence of evidence that they were received through the mails, competent evidence that plaintiff was at A. at the date of letters.

Appeal from Webster Circuit Court.

TUESDAY, DECEMBER 8.

THE parties are husband and wife. Plaintiff brought an action for divorce on the alleged grounds (1) of adultery by the wife, and (2) of cruel and inhuman treatment, endangering his life. Defendant answered denying the grounds of divorce alleged in the petition. She also filed a cross-petition in which she demanded a divorce from plaintiff on similar grounds. The circuit court dismissed both petitions, and both parties appeal, plaintiff's appeal being first perfected.

John F. Duncombe and A. E. Clarke, for plaintiff.

O'Connell & Dolliver, for defendant.

REED, J.—The allegation in plaintiff's petition is that defendant committed adultery with one H. C. Watters, at Fort Dodge, on or about the fifth day of May, 1883. Plaintiff claims to have proven three distinct acts of adultery between the parties, one occurring on the night of May 5th, another on the afternoon of the 7th, and the third on the night of the same day. We deem it necessary, however, to inquire only with reference to the transaction on the night of the 7th. The parties were married in 1874. They had one child, a girl, who was between five and six years old at the time of the transactions in question. They had resided in Fort Dodge for about two years, and for the greater part of the time had lived with plaintiff's mother. Their married life had undoubtedly been unhappy. Defendant admitted that she had ceased to love or care for her husband. It is not mate-

Names v. Names.

rial here to inquire as to the cause of this state of feeling between them. As is usual in such cases, both parties were probably in fault. On the evening of the fifth of May defendant went with her child to the house of Mrs. Walrod, who is a sister of plaintiff, where she remained until near midnight on the 7th. Mrs. Walrod kept a boarding-house, and Watters, the alleged paramour of defendant, boarded with her. He had been in the employ of Mrs. Walrod's husband for a number of years, and had lived with the family. At the time in question he worked for another party, but continued to live with the Walrods. Defendant had known Watters for a number of years, and we are satisfied that an intimacy had grown up between them. They manifested a decided preference for each other's society, and it is shown that they were often together alone. On each of the nights that defendant was at Mrs. Walrod's, when she retired to her room Watters accompanied her for the purpose, ostensibly, of carrying her child. On the night of the 7th, some time after defendant and Watters went into the room, plaintiff and his brother and a son-in-law of Mrs. Walrod also entered it. When these parties entered the room Watters was apparently about to leave it. He had no clothing on his person except his shirt and pants. Defendant at the time wore a loose wrapper. Her hair was hanging loosely about her shoulders. She had no shoes on her feet. Her corsets lay upon the bed, and other articles of clothing which she had removed from her person after she and Watters entered the room lay about it. The bed bore evidence of having been occupied, and a witness who was in an adjoining room testified that she heard the parties on the bed before plaintiff entered the room.

There is some conflict in the evidence as to the length of time they had been in the room before plaintiff entered it. He and his brother testified that they saw defendant and Watters enter the room, and that they did not disturb them for three-quarters of an hour after they entered. Defendant admitted they had been there for fifteen minutes

or more before her husband and his party came in. The other inmates of the house had retired before defendant and Watters went to the room, and they had been alone for some time in the parlor. Defendant, in her testimony, denies positively that she had intercourse with Watters on that night, or at any other time. She also attempted to explain some of the most suspicious circumstances of the situation. It seems to us, however, that the only conclusion which can reasonably be reached from the circumstances is that she is guilty. She had ceased to have any regard for her husband. She preferred the society of Watters. For three days she had absented herself from her husband, and had stopped at another house in the same town, of which Watters was an inmate, and she gives no satisfactory explanation of this circumstance. The reasonable inference, we think, is that her object in going there was that she might enjoy his society. She was found alone with him in a bed-room in the middle of the night under the circumstances detailed above. We would naturally expect her to deny her guilt, but we cannot believe that she is innocent. Adultery is peculiarly a crime of darkness. It is seldom that it can be proven by other than circumstantial evidence; and the evidence is held to be sufficient when the circumstances proven lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence. See *Inskeep v. Inskeep*, 5 Iowa, 204. And it seems to us that the circumstances proven in this case are of this character.

1. ADULTERY :
evidence of:
what is suffi-
cient.

II. The charge in defendant's cross-petition is that plaintiff committed adultery with a woman by the name of Ingersoll, at Atlantic, Iowa, in the months of May, June and July, 1880. It is shown by the evidence that the woman referred to in this charge was in Atlantic during the months of February, March and April, and part of May, 1880, and that she lived with plaintiff's brother during that time. It is also shown that plaintiff was in Atlantic during a portion of that

Names v. Names.

year, but he denies that he was there during the time Mrs. Ingersoll was there. For the purpose of proving
2. EVIDENCE: letters to that plaintiff was in Atlantic during April and
prove loca- tion of writer. May, defendant introduced certain letters which, it is claimed, were written by him to a brother of defendant, and which purport to be dated at Atlantic during those months. Defendant testified that these letters were in the handwriting of plaintiff, and that she obtained them from her brother. There is no proof, however, as to how they came into his hands. If it were shown that they were received by him through the mails, the fact that they purport to be dated at Atlantic would be strong presumptive evidence that they were written at that place. But, in the absence of evidence that they were so received, they are not competent evidence of plaintiff's presence at Atlantic at the time at which they purport to be dated.

We have examined the evidence offered in support of this charge in the cross-petition, and, without setting it out in detail, we deem it sufficient to say that in our opinion it does not establish the charge. We think, also, that the allegations of cruel and inhuman treatment in the petition and cross-petition are not proven. The judgment dismissing plaintiff's petition will be reversed, and the cause will be remanded with directions to the circuit court to enter judgment granting plaintiff a divorce. Or, at plaintiff's election, such judgment will be entered in this court.

The judgment dismissing defendant's cross-petition will be affirmed.

Cornett v. The Phenix Ins. Co.

CORNETT V. THE PHENIX INS. CO.

1. **Insurance: WAIVER OF PROOFS OF LOSS: FACTS NOT AMOUNTING TO.** A refusal to pay a claim made under a policy of insurance does not constitute a waiver of proofs of loss, unless it is of such kind and made under such circumstances as to justify the inference that such proofs would be unavailing, if made. And so, where a horse was insured against fire and lightning only, but the insured claimed that, though the horse died of disease, the company was liable for the loss, and the company refused to pay if the horse died from any other cause than fire and lightning, such refusal was not a waiver of the proofs of loss required by the policy, but was rather a demand for proof that the horse died by fire or lightning.
2. **Instructions: MUST BE SUPPORTED BY EVIDENCE.** Instructions based upon a theory of which there is no evidence cannot be sustained.
3. **Insurance: ACTION BARRED BY LIMITATION IN POLICY.** The policy in question provided that no action thereon should be sustainable unless brought within six months after the loss. The proofs of loss required by the policy were neither made nor waived within that time. *Held* that chapter 211, Laws of 1880, (Miller's Code, p. 299,) has no application to such a case, and that the action, not having been brought within the six months, was barred.

Appeal from Decatur District Court.

TUESDAY, DECEMBER 8.

ACTION upon a policy of insurance against loss by lightning. The policy covered two horses, and while the same was in force one of the horses died, and the plaintiff alleges in his petition that it was killed by lightning. The defendant denied that it was killed by lightning, and denied that the plaintiff furnished the defendant with any proof of loss, and averred that the action was not brought within the time limited in the policy. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

E. W. Curry, McIntire Bros., and R. W. Barger, for appellant.

Young & Parish, for appellee.

ADAMS, J.—I. It is not expressly shown that the policy required that notice and proof of loss should be furnished within any given time, or at all. It is, to be sure, shown that a copy of the policy was attached to the plaintiff's petition, but such copy is not set out in the abstract, and we should be wholly in the dark as to whether it contained any requirements respecting notice and proof of loss, had not the court instructed the jury upon this point. The court instructed the jury to the effect that the burden was upon the plaintiff to prove that he served notice and proof of loss within sixty days from the loss, unless the same were waived. No question is made as to the correctness of this instruction, if there was any evidence of waiver, and one of the principal questions discussed by counsel is as to whether there was any such evidence. The defendant assigns as error the giving of the instruction, upon the ground that there was no evidence upon which to base it, and assigns as error the admission of evidence designed to show waiver, upon the ground that it did not have that effect. We come, then, to consider whether the evidence introduced to show waiver had any such tendency. In our opinion it had not.

The evidence relied upon consists of a certain letter written to the plaintiff by one Burch, the general agent of the company, and of statements made by one Albright, the adjuster of the company. It is said that by the letter and statements the defendant repudiated its liability, and thereby waived proofs of loss. The letter written by Burch was in reply to a letter written him by the plaintiff, in which the plaintiff said: "Your agent represented to me when he took my note and application that if one of my horses died I

would get pay for it. One of my horses mentioned in my policy died Thursday night last, and I wrote you for the necessary blanks to make my proof. I have applied to the resident agent here, Mr. Curry, and he does not seem to fully understand the policy as I do." This letter contains no intimation that the horse was killed by lightning. The plaintiff based his claim upon the mere fact that the horse had died, and prefaced his claim by a statement that the company's agent told him that he would be paid if one of his horses died. Any fair construction of the language shows that the plaintiff designed it to be understood as claiming that the agent's statement was such that he was entitled to be paid for his horse, even if it died by disease or by accident otherwise than being killed by lightning. Not only is this the fair import of the letter, but it is shown by undisputed evidence that he did not understand at that time that his horse had been killed by lightning. On this point we have the testimony of Curry, the agent to whom the plaintiff applied after the loss. Curry testified as follows: "He told me that he had a horse die that was insured in the Phenix. I asked him what was the cause of death. He said it did not make any difference what the horse died with, as the agent who took the application said that if a horse died from any cause he would get pay for it. I told him the company insured only against loss by fire or lightning. He did not claim that the horse had been struck by lightning." The plaintiff himself testified as follows: "In that conversation with Curry he said to me: 'What is the matter with your horse?' I says, 'I cannot tell you.' He said, 'You do not expect to get anything for your horse unless he was killed by lightning, do you?' I told him what the agent told me, that I would get pay for the horse, no difference what he died with."

It was while the plaintiff was ignorant of the cause of the death of the horse, and while he thought that he could recover on the agent's statement, whatever might be the cause of the

death of the horse, that he wrote the letter to Burch. But we do not need to read the letter in the light of these circumstances. It shows upon its face that the plaintiff's claim was not based upon the fact that the horse had been killed by lightning. It shows more; it shows that he did not see the way clear to recover strictly under the provisions of the policy, and was setting up a claim upon the statement of the agent. That Burch so understood, there is no doubt whatever. His reply is as follows: "DEAR SIR: Yours of the 12th is at hand reporting the death of one of your horses, and telling us that the agent gave you to understand that said horse was insured by our policy against death by disease or accident. We have only to refer you to our policy which you hold, and which is the contract between yourself and the Phenix Ins. Co., and if that policy provides for any other loss but that occasioned by fire or lightning, we will weaken. Our policy is so clear on that point that any other statement used by agents is of no consequence. We can hardly understand how an agent would dare to make such a statement to a sane man. We are not liable for loss of horse." If we read this letter as a whole, and especially in connection with the one to which it is a reply, it is abundantly evident that the company had no intention of repudiating its liability if the horse was killed by lightning. The claim repudiated was one which the plaintiff had seen fit to set up outside of the provisions of the policy. Burch's letter did not contain an intimation that the company would refuse to pay if the plaintiff could make proof showing that his loss occurred within the provision of the policy. The letter, then, was not a *waiver* of proof; it was rather a *call* for proof. A refusal to pay does not constitute a waiver of proof unless it is of such kind and is made under such circumstance as to justify the inference that proof would be unavailing. In this case proof that the horse was killed by lightning would have tended directly to remove the only objection which had been suggested by the company.

Cornett v. The Phenix Ins. Co.

But the plaintiff claims that there was other evidence of waiver. He relies upon what the company's agent said to one Fry. The latter, it appears, was acting for the plaintiff in the matter of this loss. The adjuster went to see him, and asked what he knew about the horse being killed by lightning. What information, if any, Fry gave him does not appear. But the result was that the adjuster declined to go and see the plaintiff; saying that he lived eight or nine miles away, and that he had information that the horse was not killed by lightning. It does not appear that up to this time there had been any pretense that the horse had been killed by lightning, and certainly without such pretense there was no reason why the adjuster should go to see him. But in no view did his statement constitute a refusal to pay. We see, then, no evidence of waiver of proof, and the jury should not have been instructed upon the theory that there was.

2. INSTRUCTIONS: must be supported by evidence.

II. The policy provided that no action on the policy should be sustainable unless brought within six months after the loss. The action does not appear to have been brought within such time. It is claimed, however, that under the statute, Chap. 211, Laws of 1880, (Miller's Code, p. 299) the time was extended. Whether the statute has, under the circumstances, any application to such a case as this, we do not determine. It has, we think, no application where proof of loss is neither made nor waived within the time limited, and, as we find no making or waiver of proof within such time, the defendant's additional position that the claim is barred appears to be well taken.

3. INSURANCE action barred by limitation in policy.

REVERSED.

WEBSTER V. THE CONTINENTAL INS. CO.

1. **Insurance: PLEADING WAIVER OF PROOFS OF LOSS: MOTION TO MAKE MORE SPECIFIC.** Where one seeking to recover upon a policy of insurance pleads that the company has waived the proofs of loss required by the policy, he should, upon a proper motion, be required to state whether the alleged waiver was oral or in writing, and by what officer or agent of the company it was made.

Appeal from Audubon Circuit Court.

TUESDAY, DECEMBER 8.

ACTION on a policy of insurance against loss or damage by fire and lightning. Trial by jury. Verdict and judgment for the plaintiff. The defendant appeals.

R. W. Barger, for appellant.

J. L. Stotts and Griggs, Brainard & Griggs, for appellee.

SEEVERS, J.—In the fourth division of its answer, the defendant pleaded as a defense that it had not been furnished with the proofs of loss required by the terms of the policy. To this defense the plaintiff filed a reply, and therein pleaded—*First*, that all the proofs required by the laws of Iowa had been furnished, as shown by the petition; and, *second*, that the defendant waived further proofs than such as had been furnished. The defendant filed a motion, asking that the reply be made more specific, and the plaintiff be required to state—*First*, whether the waiver pleaded was oral or in writing; and, *second*, what officer or agent of defendant waived or undertook to waive the same, and for cause, in substance, stated that the defendant could only act through its officers or agents, and that it had many such in its employ, and that it was impossible, from the reply, to determine by what officer or agent the waiver pleaded and relied on was

Cook v. Hamilton.

made. The first ground of the motion was sustained and the second overruled. We think the court erred in not sustaining the entire motion.

The defendant can alone act through its officers and agents, and it is a well-known fact that insurance companies have many such. Now, a valid and sufficient defense was pleaded, to avoid which the plaintiff pleaded that such defense had been waived by the defendant. It is evident that this was done by some officer or agent. The defendant could not reasonably be expected to know what officer or agent had done so. The plaintiff did; for, if there was a waiver, the plaintiff must necessarily know who made it, just as certainly as he knew whether it was in writing or not. The defendant, in order to be fully prepared to successfully controvert the waiver pleaded by the plaintiff, must be prepared at the trial to produce the evidence of every officer or agent of the company who had authority to make such waiver. This is asking too much of any litigant. Common fairness in making up the issues, we think, requires that the plaintiff should state who made the waiver relied on to avoid the defense pleaded. There are several other questions in the case which, in the view we have taken, we deem it unnecessary and possibly improper to determine.

REVERSED.

COOK V. HAMILTON.

1. **Replevin:** ELECTION TO TAKE MONEY JUDGMENT INSTEAD OF PROPERTY: RIGHT TO DAMAGES FOR DETENTION. Where the plaintiff in replevin prevails, but elects, under Code, § 3241, to take a money judgment for the value of the property instead of a judgment for the possession of the property itself, he does not thereby waive his right to damages for the wrongful detention of the property by defendant.

Appeal from Carroll Circuit Court.

TUESDAY, DECEMBER 8.

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91 067
67 394
1114 320
67 394
1120 430

ACTION IN REPLEVIN. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Bowen & Cloud, for appellant.

George W. Paine, for appellee.

BECK, CH. J.—I. The defendant, as sheriff, levied an execution upon a pair of horses and a buggy and harness. Plaintiff brought this action to recover the possession of the property and damages for its wrongful detention, but, having filed no replevin bond, the action proceeded without the delivery of the property to plaintiff. This is authorized by the statute. The circuit court, upon the verdict for plaintiff, entered a judgment for the value of the property and for the damages for its detention.

II. This judgment is authorized by the statute. See Code, §§ 3238, 3239. Code, § 3241, provides that if the party found to be entitled to the possession of the property, if he be not in possession thereof, may have, at his option, judgment for the specific delivery of the property or for its value, as determined by the jury. The judgment in this case, which will be presumed to have been entered at the option of plaintiff, (upon this point there is no dispute,) is for the value of the property.

III. Defendant insists that, as the plaintiff did not recover in the action the possession of the property, he cannot recover damages for its detention. The statute makes no distinction affecting the right of the parties to damages between a case wherein the property is delivered, upon final judgment, and one in which the plaintiff waives his right to the delivery of the property by exercising the option secured to him by the statute (Code, § 3241) to recover the value of the property. We can discover no grounds upon which we are authorized to make a distinction. The theory upon which the provisions of the statute authorizing the recover of damages for the

Burroughs v. Saterlee et al.

detention of the property is based is that, as the property is owned by the plaintiff who is entitled to its possession and use, he ought to recover the value of such use in damages for its detention. The right of the plaintiff to the possession continues until he abandons it by exercising the option given him by the statute to accept the money, or money judgment, in the place of the property. As he owned the property, and was entitled to its use up to that time, he ought to recover the value thereof in a judgment for damages. The rulings of the circuit court are in accord with these views.

IV. The defendant insists that the verdict is not supported by the evidence. We think differently. There was evidence of the value of the use of the property justifying the verdict upon that question, and the proof sufficiently supports the verdict finding that the property was exempt from execution.

No other questions arise in the case. The judgment of the circuit court is

AFFIRMED.

BURROUGHS V. SATERLEE ET AL.

1. **Injunction: ALLEGATION OF INSOLVENCY AIDED BY ADMISSIONS OF DEFENDANTS.** In plaintiff's petition for an injunction he alleges that defendants have but a small amount of property exempt from execution, and are not responsible for the damages occasioned by the wrongful acts sought to be enjoined. There was no motion for a more specific statement in the court below, but, on the other hand, it was conceded on the trial, for the purposes of the case, that defendants did not own a dollar's worth of property in the world. *Held* that it could not be urged on appeal to this court that the petition was insufficient in this respect to entitle plaintiff to an injunction.
2. **Water-courses: DIVERSION OF SUBTERRANEAN STREAM: RULE STATED AND APPLIED.** When one in good faith sinks a well on his own land, the owner of a well on adjoining land has no cause of complaint if the water from his well is drawn off or decreased by percolation through the earth; but when subterranean water flows in a distinct

67	396
62	301
67	396
121	622

Burroughs v. Saterlee et al.

channel, an adjoining owner of land has no more right to divert its course than if the stream were on the surface of the earth. And so, where plaintiff had an artesian well on his land, and defendants afterwards, by boring on their adjoining land, intercepted the same stream, thereby causing the water to cease flowing in plaintiff's well, but the quantity of water was ample for both parties, and could easily be made to flow at both wells by a simple adjustment of defendants' pipes, *held* that defendants were properly required so to adjust their pipes as not to cut off plaintiff's supply of water, and that an injunction was properly granted to secure that end.

Appeal from Buena Vista District Court.

TUESDAY, DECEMBER 8.

THIS is an action in equity by which the plaintiff seeks to enjoin the defendants from interfering with the flow of an artesian well, the property of the plaintiff. There was a trial by the court, and a decree for the plaintiff. Defendants appeal.

J. F. Duncombe and *A. E. Clarke*, for appellants.

Joy, Wright & Hudson and *A. F. Meservy*, for appellee.

ROTHROCK, J.—I. The plaintiff claims that he is the owner of certain land in Cherokee county, and that he leased part thereof to the defendant George Saterlee for mining purposes; that in 1879, while boring for coal on said land, Saterlee struck three distinct veins of water, one of which is magnetic, and possesses medical properties of great value; that pipes were put in said well in the year 1879, so that the veins of water flow high enough above the surface of the ground that the water can be distributed to bath rooms built near said well; that in 1880 the plaintiff conveyed a half interest in the well, and in eight acres of land surrounding the same, to said Saterlee, and in the latter part of that year the defendants conveyed all their interest in said well and land to the plaintiff for the consideration of \$2,500, and the defendants surrendered to the plaintiff all right to the well and to the land

and improvements thereon. Soon after defendants conveyed their interest in the land and well to the plaintiff, they purchased a small tract of land adjoining plaintiff's, land and commenced boring for water. A well was sunk on this land at a point about 200 feet from plaintiff's well, and the same vein of water was struck which flowed from plaintiff's well. Before defendants purchased this tract of land, they and plaintiff were intending to buy it for the purpose of protecting the original well on plaintiff's land, and it was agreed between them that, if any well sunk on this tract affected the flow of water from plaintiff's well, defendants' well was to be closed up. And at the time defendants commenced boring for water on their land it was agreed between them and plaintiff that if water was found by them, and the flow therefrom injured plaintiff's well, the defendants would close up their well, or in some manner regulate the flow therefrom so as not to interfere with the flow of plaintiff's well; that the defendants urged the plaintiff to go on with improvements on his property, with the positive assurance that they would not divert the water from his well; that in pursuance of such promise, and on the faith thereof, the plaintiff expended about \$23,000 in improvements, consisting of a large hotel and appurtenances, and beautifying the adjacent grounds; that he advertised the medicinal properties of said water, and exported large quantities thereof, and many people frequented said watering-place for treatment and for pleasure, and that the said property became a source of great revenue to him; that, when the defendants struck the vein of water which flowed from plaintiff's well, the ground at defendants' well being lower than the discharge-pipes at plaintiff's well, the latter almost ceased to flow; that, in pursuance of the agreement between the parties, plaintiff furnished a pipe to place on top of the pipe in defendants' well, so as to make the discharge-pipes in the two wells on the same level; that the defendants put the said pipe upon the pipe in their well, and when that was done there was a flow of water from both wells sufficient for all purposes; that the

pipes were so maintained in both wells, and plaintiff continued to make improvements, relying on the defendants' carrying out their agreement and representations in good faith, until a short time before the commencement of this suit, when the defendants, disregarding their agreements and plaintiff's rights in the premises, and for the purpose of annoying him, and preventing him from carrying on his business, and rendering valueless his property, have, at different times, and when plaintiff had large orders for the shipment of water from his well, removed the pipe from their well, and prevented the flow of water from plaintiff's well, to the great damage of the plaintiff; that defendants thus interfered with the flow of plaintiff's well out of mere wantonness, they having no use for all the water from said vein, and that a very small part of the flow from their well is sufficient for their purposes when the discharge pipes are on a level; that, if defendants are permitted to thus draw the water from plaintiff's well, the plaintiff's property will be greatly damaged and his business broken up and destroyed, and the plaintiff fears that, unless restrained, the defendants will continue to divert the water from his well; that the defendants have but a small amount of property exempt from execution, and are not responsible for the damages to the plaintiff's property and business by reason of their wrongful acts.

Counsel for appellants claim that the averments of the petition do not show that the plaintiff is entitled to maintain an action for an injunction. It is urged that the petition does not aver the insolvency of the defendants. It is true, it is not stated in the petition that the defendants are proof against an execution; but it is averred that they are not responsible for the damages for which they are liable. In the absence of a motion for a more specific statement, this is sufficient. This question was not made in the court below. Instead of making the question, the following concession was made upon the trial: "It is admitted that if the plaintiff is entitled to

1. INJUNCTION: allegation of insolvency aided by admissions of defendants.

relief under the bill he is entitled to an injunction, irrespective of the financial standing of the defendants. For the purposes of this case it is conceded that the defendants do not own a dollar's worth of property in the world."

II. The evidence in the case fully sustains the material averments of the petition. These facts have already been stated, and need not be repeated. The court decreed "that the discharge-pipe upon defendants' said well be kept and maintained at a height not lower than the discharge-pipe at plaintiff's well at the bath-house on his said premises, and be of such size as not, by the flow of water therefrom, to interfere with the flow of water at plaintiff's well; and the defendants are ordered, adjudged and decreed to so maintain, keep and operate their said well that the water therefrom shall be discharged through the pipe sunk therein, and shall not be permitted or suffered to flow up around the outside of said pipe."

The evidence shows that by an observance of this decree both parties will have an ample supply of water for all purposes, and neither will have just cause of complaint against the other. The defendants ought to be satisfied with the decree. It is nothing more than an exemplification of the broad equitable principle that a person ought to use his own in such a way as not to injure another, when it can be done without injury to himself. But the defendants insist that, when one in good faith sinks a well on his own land, the owner of a well on the adjoining land has no cause of complaint if the water from his well is drawn off or decreased by percolation through the earth. That this is a correct proposition of law seems to be well settled. See *Hougan v. Milwaukee & St. P. R. Co.*, 35 Iowa, 558, and authorities there cited. Defendants' counsel have cited many authorities in support of this proposition. These authorities, however, as counsel concede, are quite decisive on another proposition, which is that, when subterranean water flows in a distinct channel, an

2. WATER-COURSES: diversion of subterranean stream: rule stated and applied.

adjoining owner of land has no more right to divert its course than if the stream were on the surface of the earth.

In Gould, Waters, § 281, the rule is thus announced: "If underground currents of water flow in clearly-defined channels, the rule of law which governs the use of similar streams flowing upon the surface is applicable to them. * * * An action will equally lie for the obstruction or misuse of a subterranean stream or of surface water after it has become a part of an open stream or spring, and the owner of land has no right to construct his well or other structure in such manner as to create upon his own land an artificial underground current from a running stream." And see, also, Washburn on Easements, 347, and Angell on Water-courses, § 112.

All of the cases define underground streams which one proprietor of land may not divert from those of the adjoining owner as those having clearly-defined channels, and it must be admitted that this fact is very difficult to establish by evidence. But here we have a case of two flowing wells. The evidence shows conclusively that the water does not percolate or filter through the earth from one to the other. When the defendants, in boring their well, struck the vein, the water almost immediately ceased to flow from the plaintiff's well, and the water that did come to plaintiff's well was filled with sand, which, no doubt, was caused by the disturbance of the vein or stream by the operations in defendants' well; and when the auger used in boring defendants' well was removed, the well of plaintiff ceased to flow. And, pending the trial, the defendants admitted of record "that the vein tapped by Mr. Saterlee's well is the same vein which supplies the well first sunk on the property now owned by Burroughs;" (the well in controversy;) and this was nothing but an admission of a fact that was not disputed and could not be controverted on the trial. When the discharge-pipe on defendants' well is lower than that on plaintiff's well, all of the water flows from defendants' well; and when the change is made, the water finds its way, not by mere filtration, but the effect is immediate.

 Peterson v. Foll.

These being the facts, we think the court very properly held that these parties should each use the water from his own well so as not to injure the other, upon the same principle that the owner of land over which a stream of water has its course may have a reasonable and proper use of the water as it flows, but may not wholly divert it from the adjoining proprietor.

AFFIRMED.

PETERSON V. FOLL.

1. **Conversion of Property: WRONGFUL SALE UNDER ATTACHMENT: PLEADING: BURDEN OF PROOF.** In an action against a plaintiff in attachment for the wrongful sale of a horse under an execution in the attachment case, the defendant in answer admitted that the horse was sold on an execution issued in his favor in the attachment proceedings. *Held* that it must be presumed that the judgment and execution followed the ordinary course of the law in such cases, and that the execution was issued by defendant's direction; and that the burden of proof was on defendant to negative these presumptions, if he would escape personal liability for the wrongful sale of the horse in question.
2. **Chattel Mortgage: SUFFICIENCY OF DESCRIPTION: QUESTION FOR JURY.** The question whether the horse involved in this case could be identified by the description contained in the mortgage under which he was claimed was one of fact to be determined by the jury, and the instructions of the court, (see opinion,) holding that certain inaccuracies in the description were immaterial, were erroneous, because invading the province of the jury.

Appeal from Winnebago Circuit Court.

WEDNESDAY, DECEMBER 9.

PLAINTIFF brought this action to recover the value of a horse on which he claims to have had a chattel mortgage, and which he alleges defendant caused to be levied on and sold on process issued in a proceeding against the mortgagor. There was a verdict and judgment for plaintiff. Defendant appeals.

Pickering & Hartley, for appellant.

Ransom & Olmstead, for appellee.

REED, J.—I. Plaintiff alleges in his petition that one Garnes executed and delivered to him a chattel mortgage on a horse, to indemnify him against liability on a promissory note which he had signed as security for said Garnes, and that he subsequently paid off and discharged the debt evidenced by said note. He also alleges that defendant commenced a suit against said Garnes on a money demand, in which he procured a writ of attachment to be issued, and caused the same to be levied on said horse, and that he afterwards obtained judgment on his demand, and caused said horse to be sold on execution in satisfaction thereof. Defendant in his answer admitted that he caused a writ of attachment to be issued against said Garnes, and that the officer to whom said writ was delivered to be served levied the same on a horse belonging to Garnes, and that the same was afterwards sold on execution issued on the judgment obtained in the proceedings, and the proceeds applied on the execution, but he denied the other allegations of the petition. The circuit court instructed the jury that the answer was in effect an admission by defendant that he had caused a horse belonging to Garnes to be attached and afterwards sold on execution.

Appellant assigns the giving of this instruction as error. He claims that the only act on his part in connection with the seizure and sale of the property, which is admitted in the answer, is the suing out of the writ of attachment; that, while the seizure of the property on the attachment and its subsequent sale are admitted, these acts are alleged to have been committed by the officer, and there is no admission that defendant procured or directed them to be done; and that, under the issue as it is made by the answer, the burden was on plaintiff to establish that defendant is responsible for the

L. CONVERSION of property: wrongful sale under attachment: pleading: burden of proof.

Peterson v. Foll.

trespass, if one was committed, in the seizure and sale of the property, whereas by the instruction he was relieved of that burden. It is certainly true that the answer does not in express terms admit that defendant directed or procured the officer to seize and sell the property. But it does admit that it was sold on an execution issued on the judgment rendered in defendant's favor in the attachment proceedings. The presumption is that the execution was special, and that it directed the sale of the attached property; also that the judgment upon which it was issued contained an order directing the sale of the attached property for the satisfaction of the judgment, for that is the course of procedure prescribed by the statute in cases in which property has been attached. Code, § 3011. The presumption also is that the execution was issued by defendant's direction. The answer should be treated as an admission of these facts, for their existence is presumed from those which are admitted. As defendant procured the order to be entered which directed the sale of the property, and the execution to be issued upon which it was sold, he is clearly responsible for its sale; and by these acts he is also held to have ratified the act of the officer in levying the attachment upon it. See Cooley, Torts, p. 129. We think the holding of the circuit court as to the effect of the answer is correct.

II. A question which arose on the trial was as to the accuracy of the description of the horse contained in plaintiff's mortgage. The court told the jury, in effect, that if a person of ordinary discernment, who had no actual knowledge as to what horse was intended to be covered by the mortgage, could have identified the animal from the description contained in the mortgage, the record of the instrument would impart constructive notice to all persons of plaintiff's right under it. It also gave the following instruction: "With reference to the color of the horse as described in the mortgage, if you should find that the horse was a shade lighter or a shade

2. CHATTEL
mortgage:
sufficiency of
description:
question for
jury.

 Snell v. The Iowa Homestead Co.

darker than what is ordinarily described as dark bay, this would not be such a misrepresentation of the horse as to make the record of the mortgage inoperative to give constructive notice to third parties." "And if you should find that in fact the horse did not have a star in the forehead as stated in the mortgage, but did have some white hairs in the forehead, this discrepancy would in itself not be sufficient to invalidate the record of the mortgage in giving constructive notice to third parties." Appellant assigns the giving of these instructions as error. The question whether the horse could have been identified from the description contained in the mortgage was one of fact to be determined by the jury. But by these instructions the court in effect held, as a matter of law, that certain inaccuracies in the description were not material. The question, we think, should have been left to the jury.

For the error in giving these instructions the judgment will be reversed, and the cause remanded for a new trial.

REVERSED.

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SNELL V. THE IOWA HOMESTEAD CO.

1. **Judgment of Dismissal for want of Prosecution:** MOTION TO SET ASIDE: SICKNESS OF COUNSEL. The sickness of counsel is sometimes a sufficient excuse for want of action in a case; but not where such sickness has been so long protracted that the client should in diligence have employed other counsel to try the case, unless it is made to appear that other counsel could not conduct the case as well as the disabled attorney. In this view, the refusal of the trial court to sustain a motion to set aside the judgment of dismissal is not disturbed on appeal.

Appeal from Buena Vista Circuit Court.

WEDNESDAY, DECEMBER 9.

THIS is an action had in the court below to set aside a judgment. It was there overruled, and plaintiff appeals.

Barcroft & Bowen, for appellant.

Hubbard, Clark & Dawley, for appellee.

BECK, CH. J.—I. The cause in which the motion was filed had been tried, and a judgment rendered for plaintiff. Upon an appeal to this court the judgment was reversed in October, 1882. In December of the same year a petition for a rehearing was filed, which was overruled in June, 1883. In March, 1884, a *procedendo* was issued, and nine days thereafter the cause was dismissed, but the abstract fails to show the grounds of the dismissal. In September following, this motion was filed to set aside the judgment of dismissal. The motion is based upon the fact that, after the cause was appealed, plaintiff employed an attorney to conduct the suit, other than the one who had prosecuted it to judgment, who thereupon withdrew from the case; that the attorney last employed, after the petition for rehearing was overruled, became sick, and unable to attend to his professional duties, and so continued up to the filing of his motion. His sickness prevented his giving any attention to the case. It is not shown that plaintiff was uninformed of the sickness of his counsel, or that he took any steps whatever to secure proper attention to his case. It appears that for ten months the attorney was sick, but it is not shown that the case could not have been conducted as well by another.

II. We think the sickness of counsel is a sufficient excuse for want of action in a case, where it appears that such sickness has not been so long protracted that the client could not have employed another attorney to take charge of the cause without imperiling his interests. It is the duty of the client not to obstruct and delay the decision of the cause by failure to employ counsel to take the place of the attorney who becomes sick. Of course, we speak of a case such as the one before us, wherein it is not made to appear that another could not conduct the case as well as the disabled attorney.

Hart et al. v. Foley et al.

It cannot be said in this case that the sick counsel was negligent; but plaintiff was, in not employing an attorney to take his place.

III. We regard this case in the foregoing consideration, as plaintiff's counsel do, as being an application by petition to set aside the judgment for unavoidable misfortune preventing plaintiff from prosecuting the case, which is authorized by Code, § 3154. It is doubtful, indeed, whether the proceedings can be regarded as a compliance with section 3155, in that it was in fact instituted by motion, and there was not what can be called a trial of the issues.

We regard, too, the decision of the court below as having been made upon the ground that plaintiff failed to show that he was not negligent. As the grounds of the decision are not shown, we are authorized to presume, as the record is silent upon that point, that it was made upon some ground sufficient to support it. But we waive these points, and decide the case upon the merits as they are presented by plaintiff's counsel. In our opinion, the judgment of the circuit court ought to be

AFFIRMED.

HART ET AL. V. FOLEY ET AL.

FULLER ET AL. V. PAGE ET AL.

HUBBARD ET AL. V. BURKHOLDER ET AL.

ALLEN ET AL V. PENDEGRAST ET AL.

1. **Injunction: APPEAL: RECORD: AFFIDAVITS USED ON HEARING OF APPLICATION.** The affidavits used on the hearing of an application for a temporary injunction are no part of the record, and, to entitle the parties to have them considered by this court on appeal, they should be preserved at the time of the hearing, either by bill of exceptions or the certificate of the judge, and filed in the clerk's office; or possibly they might be identified by the certificate of the judge made after the hear-

Hart et al. v. Foley et al.

ing. But the certificate of the clerk and the affidavits of the parties and attorneys are not competent for the purpose of such identification.

Appeals from certain orders of the judge of the district court of the Eleventh Judicial District, made in vacation.

WEDNESDAY, DECEMBER 9.

The plaintiffs in each of these actions are citizens of Webster county. It is alleged in the petition in each case that the defendants therein are keeping and maintaining a public nuisance in the county by keeping and occupying a building and place in which they are engaged in selling intoxicating liquors contrary to law. The petitions were presented to the judge of the district court in vacation for the allowance of temporary writs of injunction. The defendants were duly served with notice of the applications, and they appeared at the hearing, and resisted the same. The judge indorsed upon the petition in each case an order allowing the writ, and from these orders the defendants appeal. The cases all involve the same questions and were submited together, and will be disposed of in one opinion.

Clarke & Ervin, for appellants.

Wright & Farrell, for appellees.

REED, J.—It is shown by the orders of the district judge allowing the temporary writs that the defendants introduced affidavits in resistance of the applications. Appellants have set out in their abstracts what they claim are the affidavits introduced by them on the hearing. Plaintiffs have filed motions to strike these affidavits from the abstracts, on the ground that they are not properly identified as being part of the evidence on which the applications were heard. Appellants have set out in an amended abstract certificates of the clerk of the district court of Webster county, in which he cer-

tifies that the transcripts contain complete copies of the records in the causes, including the petitions for injunctions and the affidavits in support and resistance of the same; also the certificate of the judge of the district court, in which he certifies that the attorney who appeared for the plaintiffs at the hearing was directed to attach the affidavits, which were introduced in support and resistance of the applications, to the petitions, and file them with the petitions in the clerk's office; also the affidavit of one of their attorneys, who swears that the affidavits set out in the abstracts are the identical affidavits which were introduced on the hearing.

We are of the opinion that the motion to strike these affidavits from the abstracts should be sustained. The affidavits introduced on the hearing of an application for temporary injunction in resistance thereof are no part of the records of the causes. They constitute simply a portion of the evidence on which the judge acts in determining whether the writ shall be granted; and, to entitle the parties to have them considered by this court on appeal, they must be preserved and identified in some legal manner. When the affidavits in question came into the hands of the clerk of the district court, they did not contain, nor were they accompanied by, any legal evidence that they had been submitted to or considered by the judge upon the hearing. It is manifest, therefore, that his certificate is not competent to identify them. All he could do would be to certify that they came into his custody attached to the petition. They should have been preserved at the time of the hearing either by bill of exceptions or the certificate of the judge, and filed in the clerk's office. In that case the clerk could have sent them up on appeal in their original form, or have embodied them in the transcript, and it may be that they could be identified by the certificate of the judge made subsequent to the hearing. But the certificate of the judge which was filed in the cases does not attempt to identify the affidavits set out in the abstracts as those introduced on the hearing. It is very clear, also,

Green v. The Town of Spencer.

that they cannot be identified in this court by the affidavits of the parties or their attorneys.

The only questions relative to the merits of the cause which counsel have argued relate to the sufficiency of the evidence to justify the judge in granting the orders. As we do not have before us the evidence on which he acted, we must presume that it was sufficient. The orders appealed from will be

AFFIRMED.

67	410
133	641

GREEN V. THE TOWN OF SPENCER.

1. **Cities and Towns: ACTION AGAINST FOR TORT: PRESENTATION OF CLAIM TO COUNCIL AS CONDITION PRECEDENT.** There is no rule of common law nor provision of statute making it necessary, as a condition precedent to a right of action against a city or town upon a claim arising by reason of a tort, that the claim should be first presented to the city or town council. *District Twp. of Spencer v. District Twp. of Riverton*, 56 Iowa, 83, distinguished, as relating only to claims arising upon contract.

Appeal from Clay Circuit Court.

WEDNESDAY, DECEMBER 9.

ACTION to recover for a personal injury which the plaintiff, Margaret Green, alleges that she sustained by reason of a defective sidewalk. She averred the negligence of the town in allowing the sidewalk to become defective, the knowledge of its officers that it had become defective, and her own freedom from contributory negligence. She did not, however, aver that she presented her claim, before bringing action, to the town council. For want of such averment the defendant demurred to her petition, and the demurrer was sustained. She elected to stand upon her petition, and judgment was rendered against her for costs. She appeals.

Hall & Steele, for appellant.

Parker & Richardson, for appellee.

ADAMS, J.—The question presented is as to whether it is necessary as a condition precedent to a right of action against an incorporated town or city, upon a claim arising by reason of a tort, that the claim should be presented to the council of the town or city. In our opinion it is not. No case has been cited to us in which it has been so held, and we are not aware that in all the numerous cases of this kind brought against an incorporated town or city, and appealed to this court, it has been thought necessary by any plaintiff to aver that before bringing action he presented his claim to the town or city council. If we should now hold that such presentation is necessary as a condition precedent to a right of action, it appears to us that the profession would be greatly surprised, and it may be that not a few important rights would be lost. We should hesitate, therefore, to adopt the rule which the defendant contends for, even if the reasons for doing so were somewhat stronger than they are. But, when we come to look at the reasons urged for adopting it, we find them unsatisfactory. It is not contended that there is any common-law rule which required such presentation, nor is it contended that there is any statute which expressly requires it. The statute relied upon is section 489 of the Code, which is in these words: "All ordinances and resolutions, or orders for appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of the trustees of any municipal corporation." The defendant also relies upon a provision in chapter 146 of the Acts of the Eighteenth General Assembly, "that, in incorporated towns, ordinances, resolutions, or orders for the appropriation or payment of money, shall require for their adoption the concurrence of four trustees, or three trustees and the mayor." The defend-

ant contends that the inference is that money can be paid out only upon the order of the council, and that, such being the case, the council should be called upon to make the order. Where money is to be paid out, it should doubtless be done in the mode which the statute provides. But the provision does not appear to us to go further than the mere matter of administration. We cannot think that it was designed to affect the rights of a claimant like the plaintiff.

The defendant cites *District Twp. of Spencer v. District Twp. of Riverton*, 56 Iowa, 85. But in that case the claim in question was of a very different character. It seems clear that by section 1733 of the Code the directors of a district township are made an auditing board. The provision is that "the board of directors shall audit and allow all just claims against the district." But the claims contemplated are those arising upon contract. The district is not liable for any other. *Lane v. District Twp. of Woodbury*, 58 Iowa, 462. The reasoning, then, employed in the case cited has reference to claims arising upon contract. Such claims arise in the course of the business of the corporation. If they are just, they would ordinarily require only such examination as is expressed by the word "audit." It would, for the most part, consist of the comparison of the claim with the vouchers. That class of claims is always properly the subject of audit, and, when made against a corporation, public or private, there should be some board, committee or person having the power to audit them.

Whether, in the absence of a statutory provision expressly constituting an auditing board, they must be presented as a condition precedent to a right to sue upon them, we need not determine, because the plaintiff's claim is not of that kind. It did not arise in the course of business, and is not the subject of "audit," in the proper sense of the word. The examination of such a claim may, and usually would, require the aid of experts and other means of determination, which would render the examination inconsistent with the

Williams v. Collins et al.

idea of an audit of the claim. There would not, it is true, be any objection to the presentation of such a claim. Its presentation might lead to its investigation and settlement. But this would be true of a claim made against a private corporation or individual. The possibility of a settlement upon presentation does not make presentation a condition precedent to a right of action. Where claims arise upon contract, and their correctness can be determined by accompanying vouchers, or by reference to books and papers, or by other means within the control of the party against whom the claim is made, the reason for their presentation is of a very different character. We are justified in holding upon slight grounds that such claims should be presented as a condition precedent to a right of action. In holding that presentation was necessary in this case we think that the court erred.

REVERSED.

WILLIAMS V. COLLINS ET AL.

1. **Fraudulent Conveyance: NO RECOVERY BY GRANTOR OF GRANTEE: WHEN THE RULE DOES NOT APPLY.** When one conveys his property to another with the purpose of hindering or defrauding his creditors, he will not be allowed to recover the property or its value from his grantee; but where the grantor was a young and ignorant man, and was induced by his uncle, who had been his advisor, to convey the property to him, in order to avoid being ruined by suits, which the uncle falsely represented that the young man's brothers and sisters were about to institute against him in order to deprive him of the inheritance which he had received from his father, *held* that the rule did not apply, and that judgment was properly rendered against the uncle in favor of his grantor for the damages suffered by reason of the fraud,—he having disposed of the property to an innocent purchaser.
2. **Innocent Purchaser: OF LAND FROM ONE HOLDING TITLE BY FRAUD: JUDGMENT AFFECTING UNPAID PURCHASE MONEY.** W. by fraud procured the legal title to plaintiff's land and sold it to C., who had no knowledge of the fraud. In an action by plaintiff against W. and C., *held* that the court properly rendered judgment against W. for

Williams v. Collins et al.

the damages which plaintiff had suffered by reason of the fraud, and properly required W. to surrender to plaintiff the unpaid notes and mortgage given by C. for purchase money,—the amount thereof, when paid, to be credited upon the judgment against W., but that it was error to decree that a failure of W. to deliver the securities to plaintiff should work an assignment of the debt to him, and that C. should in any event pay the money to plaintiff. C.'s payment to plaintiff should have been made to depend upon the delivery of the notes to him.

Appeal from Marion Circuit Court.

WEDNESDAY, DECEMBER 9.

THIS action involves the title to a farm in Marion county. The plaintiff claims to be the equitable owner of the land, and seeks to quiet his title as against all of the defendants, and to set aside and vacate a conveyance thereof made to the defendant Nathan Collins. There was a decree for the plaintiff in the court below granting part of the relief he demanded, and the defendants appeal.

J. Kipp & Sons and John F. Lacey, for appellants.

Stone, Ayers & Co. and C. H. Robinson, for appellee.

ROTHROCK, J.—I. The plaintiff was the owner of a farm which he inherited, in part at least, from his father, who died when plaintiff was a child some ten or twelve years of age. Soon after plaintiff became twenty-one years old, he sold the farm for about \$3,000 in cash. He contracted with one Marion Young for another farm, and paid him \$100 in hand, and agreed to pay him \$2,900 as soon as the land was conveyed to him, and \$800 in two years, to be secured by personal security, or by a mortgage on the farm. When the deed was ready for delivery from Young to the plaintiff, an arrangement was made between the plaintiff and Young and the defendant J. M. Williams, by which the deed from Young to the plaintiff was destroyed, and a deed was made by Young to J. M. Williams. All of the proceeds of the

1. FRAUDULENT conveyance: no recovery by grantor of grantee: when the rule does not apply.

farm which plaintiff sold were paid over to Young, and the balance was secured by a promissory note executed by the plaintiff and the defendant J. M. Williams. Some time after the land was conveyed to J. M. Williams he sold and conveyed it to the defendant Nathan Collins.

The plaintiff charges that the defendant J. M. Williams procured the title to the land by fraud. It appears that the plaintiff is illiterate and unlearned, and that J. M. Williams, who is his uncle, was the one to whom he looked for advice and assistance in his youth and inexperience, and that Williams took advantage of the confidential relations existing between them, and procured the title to the farm by falsely representing to the plaintiff that the brothers and sisters of the plaintiff's father were about to institute suits claiming an interest in the farm which he inherited from his father, and that they would harass plaintiff and divest him of all his property by such law-suits, and advised him that, to avoid financial ruin, he should allow the land to be conveyed to him, (said J. M. Williams,) and that when said trouble was ended he would convey the land to the plaintiff. The defendant J. M. Williams denied that he made any such representations, and insisted that he purchased the land from the plaintiff in good faith, and that he has paid him the greater part of the purchase money therefor. This is the principal question in the case.

The court found that the claim made by the plaintiff as to the destruction of the deed and conveyance of the land, and the representations by which the conveyance was procured, was sustained by the proof. We think this finding was correct, taking all of the facts and circumstances disclosed in the evidence, and we are well satisfied with the conclusion reached by the circuit court. But the defendants contend strenuously that the transaction is within the familiar rule that, when one conveys his property to another with the purpose of hindering or defrauding his creditors, he will not be allowed to recover the property from his grantee, because the law

Williams v. Collins et al.

will leave him where it finds him, and will not allow him to take advantage of his own wrong or fraud. We think the evidence in this case shows that it is not within this rule, for two reasons. In the first place, it very clearly appears that the plaintiff regarded his uncle as his advisor, and reposed a peculiar trust and confidence in him, and the defendant ought not to be allowed to profit by an advantage gained by the confidential relations which existed between him and the plaintiff. The other reason why the plaintiff should not be allowed to invoke the rule is, that the statements that the brothers and sisters of plaintiff's father were about to assert claims against the estate are shown by the evidence to be without foundation in fact. It clearly appears that there were no creditors to be defrauded by the transaction which is the ground of this action.

II. The court found that the defendant Nathan Collins, when he purchased the land from J. M. Williams, had no notice of the plaintiff's equities, and that at the commencement of this suit he was indebted to J. M. Williams on the purchase money of the land in the sum of \$2,200, and interest. Judgment was rendered in favor of the plaintiff and against the defendant J. M. Williams for the sum of \$4,230.70, and costs; and he was ordered to surrender to the plaintiff the notes, mortgage, or other security for the purchase money given by Collins to him, and that, upon his failure to make such surrender, the decree should operate as an assignment of the claim for purchase money, and Collins was ordered to pay all of said unpaid purchase money to the plaintiff, and, when paid, the same should be a credit on the judgment rendered against J. M. Williams. The amount of the judgment against J. M. Williams is not excessive. It is fully sustained by the evidence. But we think the decree should be modified as to the defendant Collins. The payment of the amount due on his notes executed to Williams should be made to depend upon the surrender

2. INNOCENT purchaser: of land from one holding title by fraud: judgment affecting unpaid purchase money.

Barbee, Assignee, v. Hamilton, Sheriff.

to the plaintiff by Williams of the notes in question. That part of the decree providing that a failure by Williams to surrender the notes should operate as an assignment of the notes might properly be made, and payment by Collins to plaintiff might have been made absolute, if it had been shown by the evidence that Williams was still the owner of the notes. There is neither averment nor proof on this question. All that appears is that Collins gave certain notes to Williams. It is not shown that Williams was the holder of the notes when the decree was entered. If he was such holder, he was bound to comply with the order of the court to surrender them to the plaintiff, and the law affords ample means to enforce the order.

MODIFIED AND AFFIRMED.

BARBEE, ASSIGNEE, v. HAMILTON, SHERIFF.

1. **Estoppel: FRAUD BETWEEN HUSBAND AND WIFE IN OBTAINING CREDIT: INCOMPETENT EVIDENCE.** A husband's name was Martin O., and his wife's name was Maggie, O., and they both did business under the name of M. O. An attachment against Martin was levied on a stock of goods claimed by Maggie, and she brought her action to recover the goods from the sheriff. Afterwards she assigned to plaintiff, who was substituted as a party to the action. The issue presented by the answer was that, because of the manner in which Maggie permitted the business to be done, she was estopped from claiming the goods, although they in fact belonged to her; or, if such was not the issue, then that the manner in which the business was conducted constituted such a fraud as entitled the creditors of Martin to seize the goods and subject them to the payment of his debts. *Held* that under the issues, as thus stated, evidence of property statements signed by the husband, and furnished to creditors from whom he purchased goods, were not only irrelevant, but that, in the absence of evidence tending to show that the wife had any knowledge of the statements, or that the creditors supposed that they were made by her, or that they were selling goods to her, she could in no manner be bound thereby.
2. **Pleading: EVIDENCE.** Only ultimate facts should be pleaded, and the pleading of evidence irrelevant to the real issues does not make such evidence admissible on the trial.

Barbee, Assignee, v. Hamilton, Sheriff.

Appeal from Carroll Circuit Court.

WEDNESDAY, DECEMBER 9.

ACTION to recover possession of a stock of goods. The defendant is sheriff, and justified the taking under certain writs of attachment against M. Olson. Trial by jury, judgment for the defendant, and plaintiff appeals.

Cole, McVey & Clark, for appellant.

Bowen & Cloud, for appellee.

SEEVERS, J.—This action was commenced by Mrs. Maggie Olson, and, as we gather from the instructions, the plaintiff, as her assignee, was substituted as plaintiff. We also gather from the record that plaintiff's assignor claimed possession of the goods under the name of M. Olson, and under that name, as we understand, she was engaged in business. Her husband's name is Martin Olson, but he also did business under the name of M. Olson. The attachments were issued against M. Olson, but the indebtedness was contracted by Martin Olson. As a matter of convenience, when the plaintiff is mentioned it will be understood that we refer to Maggie Olson. The defendant pleaded in estoppel, and in bar of the action, that the plaintiff permitted her husband, Martin Olson, to use small sums of money furnished by her in conducting business, she giving part of her time to said business, and sharing the profits thereof; that plaintiff's right to said property, if any existed, was a secret and private understanding between herself and husband, and known to but a part of the creditors; that the plaintiff permitted Martin Olson to purchase goods of certain named creditors in her name and upon her credit, and put said goods in the Olson bankrupt store as a part of said stock; that said business was conducted in the name of M. Olson, the name of the plaintiff

1. ESTOPPEL:
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and her husband, in order to cheat and defraud their creditors, and that the plaintiff consented to the use of her interest in said stock for this purpose and in this way; that all of the debts upon which said attachments are based are debts of said firm of M. Olson; that said goods were purchased for said firm, received by the said firm, and only partially disposed of by said firm, and that plaintiff's interest therein became and was liable to the payment of said debts; that in each case credit was extended to said M. Olson, or Mrs. M. Olson, in view of the fact that said stock was owned by one or both of them. The defendant did not plead that the plaintiff and her husband were partners, or should be treated as such because of the manner in which they did business, or that they, or either of them, intended to or did perpetrate any fraud on their creditors, unless it can be inferred from what has been stated. Under the issues, as we understand them, it was incumbent on the plaintiff to establish that the goods belonged to her. She introduced evidence which tended to support her claim. It was then incumbent on the defendant to sustain the issue on his part, which we understand to be that, because of the manner in which the plaintiff permitted the business to be done, and because of the manner in which it was done, the plaintiff was estopped from claiming the goods, although they in fact belonged to her; or, if such was not the issue, then that the manner in which the business was conducted constituted such a fraud as would entitle the creditors of Martin Olson to seize the plaintiff's goods and have the proceeds applied to the payment of the debts of Martin Olson.

Such being the issues, the plaintiff introduced Martin Olson as a witness, and the only material thing testified to by him which tended to sustain the issue on the part of the plaintiff was as follows: "I have not, since I went to Nebraska to do business, had any interest in the stock of goods here in Carroll." Upon cross-examination of this witness, the defendant was permitted to identify certain property state-

Barbee, Assignee, v. Hamilton, Sheriff.

ments furnished the creditors from whom goods were purchased. The statements were signed by M. Olson; that is to say, they were furnished the creditors by Martin Olson, and signed by him. The property statements were introduced in evidence by the defendants. All of this evidence was objected to by the plaintiff, and we think it was clearly inadmissible, because it had no tendency to sustain, nor was it applicable to, any issue in the case. The evidence may have tended to show that Martin Olson falsely and fraudulently misrepresented the amount of his property, and his ability to pay at the time he purchased the goods, but there was no such issue as this. There is no evidence tending to show that the plaintiff had any knowledge of said statements, or that the creditors supposed they were made by her, or that they were selling her goods; and, besides this, there was no such issue. But, if there was, the statements had no tendency to establish it.

Complaint is made of the instructions, but we deem it unnecessary to consider them, because we think it will be obvious to counsel for the defendant that the answer should be amended, and clear-cut and well-defined issues presented, before this case is retried.

It perhaps is proper to say that counsel for the appellee seem to think, because they set up and pleaded the property statements, therefore they were admissible in evidence. But this is a mistake. Ultimate facts alone should be pleaded, and not the evidence which tends to prove such facts.

REVERSED.

THE IOWA FALLS & SIOUX CITY R'Y CO. v. BECK.

THE SAME v. FIELD, ADM'R.

THE SAME v. WENTWORTH ET AL.

THE SAME v. NICHOLS ET AL.

THE SAME v. NICHOLS.

THE SAME v. STONE.

1. **Railroad Lands: GRANT TO DUBUQUE & PACIFIC RAILROAD COMPANY: WHEN TITLE PASSED.** The title to the lands granted to the Dubuque & Pacific Railroad Company by act of congress, approved May 15, 1856, and by the act of the general assembly of the state of Iowa, approved July 15, 1856, did not pass to the company until the company had filed in the office of the governor a map or plat showing its route, and the governor had signed the same and filed it in the general land-office at Washington, as provided by section six of said last named act. It follows that lands within the six mile limit, which had been pre-empted prior to such filing, did not pass to the company or its successors.
2. ———: ———: **HOMESTEAD TITLES ACQUIRED AFTER ADJUSTMENT OF RAILROAD CLAIMS.** After the claims of the railroad under said grants had been finally adjusted, as it was supposed, lands which remained were thrown open to homestead entry. *Held* that the company could not defeat the titles procured under the homestead laws, on the ground that, after the supposed final adjustment, the title to a large amount of the lands included in said adjustment failed.
3. ———: ———: **INDEMNITY LANDS: SELECTION NECESSARY.** No claim can be maintained by the railroad company or its successors to lands as indemnity lands, unless they have first been selected as such, as provided in the act of congress relating thereto.

Appeal from Woodbury District Court.

WEDNESDAY, DECEMBER 9.

THESE causes involve substantially the same questions, and they were tried and submitted in this court upon one set of abstracts and arguments, and they were argued orally as one

case. The plaintiff and the several defendants present conflicting claims to certain lands in Woodbury county. The actions are in equity, and upon a final hearing in the district court a decree was entered dismissing the plaintiff's petitions, and adjudging the title to the lands to be in the defendants, as prayed in their respective counter-claims. The plaintiff appeals.

Joy, Wright & Hudson, for appellant.

C. R. Marks and Geo. W. Wakefield, for appellees.

ROTHROCK, J.—I. The plaintiff claims to be the owner of the real estate in controversy under the grant of lands made by act of congress approved May 15, 1856, and the act of the general assembly of the state of Iowa, approved July 15, 1856, accepting said grant and providing for carrying into execution the trust conferred upon the state of Iowa by said grant of lands by congress. It is claimed by the plaintiff that it is the successor in interest of the Dubuque & Pacific Railroad Company, the original corporation which was designated by said act of the general assembly as one of the beneficiaries under said congressional grant. That part of the record which shows the transfer of the rights of the Dubuque & Pacific Railroad company, and the acts of the general assembly of Iowa approving the same, and the change made in the different railroad organizations connected with the building of the road, need not be considered, as no question is made thereon, and the plaintiff will be regarded in this opinion as the legal successor in interest of the Dubuque & Pacific railroad Company.

That part of the act of congress, approved May 15, 1856, which is material to be considered in determining the questions involved, granted to the state of Iowa, for the purpose of constructing four railroads across the state from east to

1. RAILROAD
lands: grant
to Dubuque &
Pacific rail-
road com-
pany: when
title passed.

west, every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads. The act provided that "in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; which lands (thus selected in lieu of those sold and, to which pre-emption rights have attached as aforesaid, together with the sections, and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the state of Iowa for the use and purpose aforesaid: *provided* that the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads." It is provided in another section of said act of congress "that the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other. * * *

In pursuance of this grant, the general assembly of Iowa, in extra session in July, 1856, by an act approved on the fourteenth of that month, accepted the grant and disposed of said lands to four railroad corporations. By the fifth section of the act, all of the lands granted by congress to aid in building a railroad from the city of Dubuque to a point on the Missouri river, at or near Sioux City, were granted, disposed of and confirmed to the Dubuque & Pacific Railroad Company, of which, as has been said, the plaintiff herein is successor. That act further provided as follows: "Sec. 6.

The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next after the passage of this act, and maps or plats showing such lines or routes shall be filed in the office of the governor of the state of Iowa, and also in the office of the secretary of the state of Iowa. It shall be the duty of the governor, after affixing his official signature, to file such map in the department having the control of the public lands in Washington, such location being considered final only so far as to fix the limits and boundary in which said lands may be selected, and if it shall appear that the lands that have been donated by the act of congress aforesaid, for the construction of the several lines above indicated, cannot be obtained within the limits and along any part of the lines aforesaid, the governor shall from time to time appoint agents to make such selections as may be authorized or granted by congress for the lines aforesaid; but the compensation of such agents, and the costs, expenses and charges attendant upon and occasioned by making such selections, shall be fixed, regulated, paid and borne by each of said railroad companies, respectively, upon and for its own line."

The Dubuque & Pacific Railroad Company located their line of railroad over and past all of the land in controversy on the fifth day of July, 1856. When it is said the line was there located, it is meant that a corps of engineers ran a line and set stakes in the ground at certain distances from each other. This was done before the enactment of the law by which the state of Iowa accepted the grant and disposed of it to that company. The whole line was surveyed and staked off prior to August 31, 1856. The map was certified by the officers of the company September 26, 1856, and filed in the office of the governor of the state of Iowa on the second day of October, 1856. The governor signed and certified the map on the same day, and filed it in the general land-office October 13, 1856, with the proper certificates thereon. This was the information and *data* from which the officers of the

federal land department were enabled to proceed to an intelligent and accurate adjustment of the grant. The line thus fixed remained as the established line, and the railroad was afterwards constructed thereon.

The lands in controversy in all of these actions, except that in which Thomas J. Stone is defendant, are parts of odd sections within six miles of the line of road. The road actually runs through some three or four of these tracts. In all of these cases pre-emptions were filed by different parties upon the lands in controversy in the month of July, 1856, and in those against French and Wentworth the defendants claim directly through patents since issued, and which patents are based upon the original pre-emption filings. In the other cases the pre-emptions were perfected by final proof and entry, but the entries were afterwards canceled. All of the lands have been patented by the United States to the defendants or to their grantors. It was the policy of the general land-office to authorize pre-emptions up to October 13, 1856, and these entries were nearly all under the direct authority of the officers of the government who were charged with the duty of selling its lands and adjusting the grants. Afterwards there was a change of policy, and, under an opinion of the attorney-general of the United States, the pre-emptions made after the survey of the line were canceled. Some of the pre-emptors of these lands afterwards, upon application, procured the cancellations to be set aside. Soon after the passage of the act of congress, an agent was appointed by the state to aid in the adjustment of the grant. Lists were made of lands within the six-mile limits, which list designated the acreage of all the tracts; acreage of that sold or appropriated; acreage of that suspended for various causes; acreage of vacant lands passing under the grant; and acreage of interferences of a special character. These were what were called preliminary lists, and included all of the lands within the limits of the grant. From these lists the officers of the general land-office made up what were called approved

lists, which designated the lands that passed to the state under the grant; and, although the agents of the railroad company succeeded in procuring the cancellation of some of the entries, none of the lands in suit were ever put in the approved lists.

In April, 1863, the grant was adjusted and fully satisfied, as it was supposed. In this adjustment the lands in suit were not held to have passed under the grant; at least other lands were taken in lieu thereof and as indemnity for them. The plaintiff at no time after that, up to the time of commencing these actions, made any specific claim to these lands, and they were not then, and have never since been, certified to the state as having passed under the grant. If the adjustment made in April, 1863, had remained intact, no claim would have at any time been made by plaintiff for the land in suit, because the adjustment gave to the plaintiff the full amount of land granted by congress. This adjustment was made upon the theory that the grant previously made by congress to improve the Des Moines river did not include any lands north of the Raccoon fork of that stream. Afterwards, and in December, 1866, it was determined by the supreme court of the United States that the Des Moines river grant extended to the northern boundary of the state of Iowa. *Wolcott v. Des Moines Company*, 5 Wall., 681. By this decision more than 70,000 acres which were included in the adjustment of 1863 were awarded to the Des Moines River Company. The plaintiff, or those under whom it claims, then sought to return to an investigation of their rights, and to obtain other lands certified as part of the grant. Several years afterwards the railroad was built past and through the lands in controversy. The plaintiff then made no claim to these lands, but recognized the rights of some two or three of the defendants by causing a sheriff's jury to be selected to condemn the right of way for the railroad over the lands, which condemnation was made, and the damages awarded were paid by the plaintiff to the defendants. These condem-

nation proceedings were had in March, 1869, and, although subsequent lists of lands were made by agents of the plaintiff, and presented for certification, none of the lands involved in any of these suits were embraced therein. Most of these lands were improved farms when the railroad was built, with dwellings and other buildings in plain view of the road.

After the adjustment of 1863, and as late as 1866, the lands not included in the adjustment were again thrown open

2. —: —: to homestead entry, and some two or three of the defendants procured title under the homestead laws; and, although the evidence shows that the plaintiff and its predecessors in right had active, vigilant and efficient agents, who were familiar with every act done in administering and settling the grant, from the time of its inception down to the commencement of these suits, the title to all of these lands was allowed to pass to the defendants, without objection or protest, so far as the public records show. It is insisted that the plaintiff, by its acts, is estopped from now asserting any claim to these lands. Whether the point is well taken or not, we need not determine. We may say, however, that if the plaintiff's acts do not amount to a technical estoppel, as defined in the law, they present in these actions what the law denominates as stale demands. But we think these cases may be disposed of upon another, and, as it appears to us, very satisfactory, ground. As has been stated, all of these lands within the limit of six miles were pre-empted in July, 1856. The map of the road was not prepared and filed for some time after that. The plaintiff claims that the title to the land passed to its predecessor or grantor when the line of road was surveyed and the stakes driven in the ground along the line. We think this position is not well taken, and that the title did not pass until the maps were filed in the general land-office, so that the officers of the government could intelligently and properly determine what land, as designated by section, township and range, passed under the grant. The act of con-

homestead titles acquired after adjustment of railroad claims.

gress granted the land to the state, and the state accepted it and disposed of it to the plaintiffs' grantors. By the act of acceptance the railroad company was required to make the maps designating the line, and no other way was provided to ascertain the lands than by the map of the line of road. Appellant cites us to many cases which announce the doctrine that these grants were grants *in præsenti*, and that the right to the land was perfect upon the permanent location of the road upon the face of the earth. But many of the same cases include the filing of the maps as an act necessary to complete the permanent location. *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 Iowa, 476; *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S., 27; S. C., 3 Sup. Ct. Rep., 485.

We cannot adopt the views of the plaintiff that the right to these lands became fixed and absolute by the driving of stakes in the month of July, and that the seeker of a home upon wild lands was bound to trace a line of stakes in the grass, and determine at his peril that he was not trespassing upon land that had been selected under a railroad grant. The act of the general assembly of Iowa plainly prescribes the steps necessary to be taken by the railroad companies to entitle them to the benefit of the grant, and these acts require more than the mere survey of a line and driving stakes in the ground. This was the construction which was put upon the law by the commissioner of the general land-office at the time. Pre-emptions were allowed to be made up to the date of the filing of the map. The lands did not pass by the grant, because "the right of pre-emption had attached to the same before the line of the road was definitely fixed. It is true that these pre-emptions were afterwards canceled by the procurement of the railroad company, upon the alleged ground that they were in conflict with the railroad grant. We have seen that there was no conflict, and that, so far as the rights of the railroad company were involved, they were valid pre-emptions. Some claim is made that the entries were fraudulent. There might, possibly, be merit in the

claim if the cancellations had been made upon this ground. But we repeat that they were held invalid upon the sole ground that they were in conflict with the railroad grant. They were wrongfully canceled, and the plaintiff's predecessor or grantor acquired no right by the cancellation. As we have seen, some of the entries were reinstated and the land patented to the defendants. In the others the land was thrown open in 1866 for homesteads, and, never having passed to the plaintiff under the grant, it was rightfully patented to the defendants under the homestead law.

II. The land patented to the defendant Thomas J. Stone is not within the limit of six miles. It is between the six ³ — : — : and fifteen mile limit, and if plaintiff ever had any claim thereto it was what is called indemnity or lieu lands, to be selected by the railroad company to indemnify it for such of the lands in the odd sections within the six-mile limits as has been disposed of, or to which pre-emption rights had attached. It is enough to say, with reference to this land, that it has never been claimed or selected by the plaintiff as indemnity land. That a selection of the indemnity land claimed is necessary is no longer an open question. *Ryan v. Railroad Co.*, 99 U. S., 382; *Grinnell v. Railroad Co.*, 103 U. S., 742; *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S., 27; S. C., 3 Sup. Ct. Rep., 485.

In *Stone's Case* a pre-emption was filed on the land March 1, 1856, and remained uncanceled on the books of the land-office October 13, 1856. It is probable that this was the reason that the land was never claimed as indemnity, and that with other unclaimed lands it was put upon the market in 1866 and sold to Stone.

In our opinion the decree of the district court is correct, and it is therefore

AFFIRMED.

Hutchinson v. Wells et al.

HUTCHINSON V. WELLS ET AL.

1. **Appeal to Supreme Court:** TRIAL OF EQUITY CASE UPON ERRORS: STIPULATION AS TO EVIDENCE. The parties to an equity case have the right to have it reviewed in this court upon errors duly assigned, and, having so agreed, they may, to effectuate such purpose, agree upon the evidence introduced and considered by the court below, as provided in § 3170 of the Code.
2. **Mortgage Securing Successive Notes:** SALE OF NOTES TO DIFFERENT PARTIES AND SEPARATE FORECLOSURES THEREON: SALE OF MORTGAGED PREMISES TO ONE OF THE NOTE-HOLDERS: EQUITIES AND RIGHTS OF REDEMPTION AS BETWEEN THE SEVERAL PARTIES. See opinion for facts and conclusions of law.

Appeal from Delaware Circuit Court.

WEDNESDAY, DECEMBER 9.

E. N. Carr, for appellant.*Blair & Norris*, for appellees.

SEEVERS, J.—I. This action was commenced and tried in the circuit court as an action in equity. The decree was rendered on June 25, 1884, to which the plaintiff at the time excepted. This appears of record, but no bill of exceptions was ever signed, and the trial judge has not certified the evidence up to this court as provided in section 2742 of McClain's Code. In April, 1885, the parties stipulated that "the abstract contains all the evidence offered, introduced or received on the trial of said cause, * * * and this cause shall be tried in the supreme court on errors duly assigned, and shall not be tried in said court *de novo*. And this agreement is made only for the purpose of obtaining such trial on errors assigned." Counsel for the appellees insist that we cannot look into the evidence for the purpose of determining the uncontroverted facts, for the reason that the trial judge alone, under

1. APPEAL to
supreme
court: trial
of equity case
upon errors:
stipulation as
to evidence.

the statute, can certify the evidence in an equity cause up to this court. For the purposes of this case this may be conceded, where a trial anew is sought and insisted on in this court; but we think the parties had the right to prepare and have this case tried in this court on errors duly assigned, and to effectuate this purpose they had the right to stipulate or agree upon the evidence introduced and considered by the circuit court, as provided in section 3170 of the Code. This having been done, we have the right, and it is our duty, to look into the evidence agreed upon and contained in the record, at least for the purpose of ascertaining the conceded or uncontroverted facts.

II. The undisputed facts we understand to be that in 1868 one Lawrence executed a mortgage on 160 acres of land to secure the payment of seven promissory notes due in 1868, 1870, 1871, 1872, 1873, 1874, and 1875. We are not advised whether or not the first three notes have been paid. Neither party, however, claims any relief based on the ownership or non-payment of the said notes. The defendant Wells is the owner of the notes due in 1872 and 1873. He commenced an action on these notes and to foreclose the mortgage, but the record before us does not show that such action has been determined, and we deem it sufficient to say that the adjudication made in this case cannot in any manner affect Wells' rights in said action.

Lawrence sold and conveyed the mortgaged premises, subject to the mortgage, to one Colton, who afterwards conveyed to Wells. The note due in 1874 became the property of George Snell, administrator, and the one due in 1875 became the property of W. W. Merritt, administrator. Both of these notes were placed in the hands of Bronson & Leroy, attorneys at law, for collection. Actions were brought thereon and to foreclose the mortgage. Separate judgments on the notes and foreclosure of the mortgage were obtained; but, as neither

2. MORTGAGE securing successive notes: sale of notes to different parties and separate foreclosures thereon: sale of mortgaged premises to one of the note-holders: equities and rights of redemption as between the several parties.

plaintiff was made a party in the other action, the right of redemption in equity was not cut off by the decree in either case. Executions were issued on both decrees for foreclosure, and the mortgaged property offered for sale under both executions on the same day. Bronson & Leroy, as attorneys for the plaintiffs in execution, directed the sheriff to sell sixty acres of the mortgaged premises under the Snell foreclosure, and the remaining 100 acres under the Merritt foreclosure. The plaintiff purchased the 100 acres, and in due time the sheriff conveyed the same to him. Bronson & Leroy bid off the sixty acres in the name of one Dobbins, who failed to comply with the terms of the sale, and finally the execution was returned unsatisfied. The defendant Wells is the owner of the Snell judgment, and has caused an execution to be issued thereon, and thereunder was proceeding to sell the 100 acres which the plaintiff had purchased under the Merritt foreclosure. Thereupon this action was commenced, the object of which is to enjoin the proceedings under the execution, and compel Wells to first sell the sixty acres of land, or that the plaintiff be permitted to redeem by paying the amount due on the Snell judgment. The defendant Wells, in pleadings filed by him, asked to redeem from the sale to the plaintiff, and offered to pay the amount of the Merritt judgment, with interest and costs. The court granted the relief asked by Wells; that is, he was permitted to redeem from the plaintiff by paying the amount bid by the latter at the sheriff's sale, with ten per cent interest from that time; and, if he failed to make such redemption in sixty days, proceedings under the Wells or Snell judgment were enjoined as to the 100 acres until the sixty acres were first sold.

III. The appellees insist that Bronson & Leroy had no authority to direct that the land should be sold as above stated, and had no authority to bid off the land in the name of Dobbins, and we think the circuit court, under the evidence, could well so find, and that we are bound thereby. The appellant claims that the defendants

THE SAME.

had full knowledge of the arrangement made by Bronson & Leroy, and that the plaintiff purchased the 100 acres under the belief that the lien under the Snell judgment had been satisfied and discharged; but, as the arrangement was made without authority, and has never been in any way ratified or adopted, it cannot prejudicially affect them.

IV. It will be observed that both the Snell and Merritt liens were on the whole 160 acres, and that the former was

the senior lien, and it remains wholly unsatisfied, and the defendant Wells, as owner, has the right to sell the whole tract of land in satisfaction of the lien; but he has no right to have his lien satisfied by the sale of the 100 acres owned by the plaintiff, nor has the latter the right to compel Wells to resort to the sixty acres owned by him, and by the sale thereof charge the lien on that tract alone. The plaintiff has no lien on the sixty acres, or interest therein. When he became the purchaser under the Merritt foreclosure, the lien was discharged; but the plaintiff, as a purchaser, has a right to redeem the 100 acres from the lien of the prior mortgage. Merritt was not made a defendant to the foreclosure of the Snell mortgage, and by his purchase the plaintiff obtain all the rights of Merritt; but he cannot invoke the principle, where a person has a lien on two funds, and another person has a lien on only one of them, that the former can be compelled to first exhaust the fund on which he has the sole lien before he can resort to that on which there are two liens; for the reason that there was but a single fund or tract of land upon which the mortgage under which Wells claims became a lien, and by no act of his, or those under whom he claims, has such lien been in any respect changed. It is obvious that the plaintiff cannot, by any act of his, impair the rights of Wells to the latter's prejudice; and, as Wells is now the owner of the sixty acres, it would be clearly prejudicial to him if he is compelled to look alone to that tract of land for the satisfaction of his lien. The plaintiff insists that, as he has the right to redeem, he has the right to have

the Wells lien assigned to him, and that, as the mortgagor has been released, he cannot be compelled to redeem, because, when he does so, he is entitled to the personal liability of the mortgagor, as well as the lien on the land, for the purpose of satisfying the debt. The plaintiff can only redeem the 100 acres from the Wells lien, and he is not entitled to such assignment, because he does not own, nor has he a lien on the sixty acres; and, when he does redeem his own land, he must pay the whole mortgage debt, or, at least, the amount of the Wells lien. When he does so, it may be he would be entitled to have charged on the sixty acres a *pro rata* share of the amount paid Wells. As the plaintiff is not entitled to an assignment of the lien, he is in no respect prejudiced by the release of the mortgagor.

It is urged that Wells, as the holder of the prior lien, can redeem from the plaintiff, and that this case is like *Smith v. Shay*, 62 Iowa, 119; and that, under the authority of that case, the decree of the circuit court must be sustained; but there is a material distinction between the two cases. In the cited case, the prior mortgagee had foreclosed his mortgage and had become a purchaser of the real estate under the foreclosure, and, as the junior mortgagee had not been made a party to the foreclosure, it was held that he had a right to redeem, and also that the prior mortgagee and purchaser could redeem or pay off the junior lien, and thus become the owner of the real estate discharged of both liens. The defendant Wells is not a purchaser under the mortgage, and therefore is not entitled to the rights of such a purchaser. It is true, the whole mortgaged property has been conveyed to him. But it was conveyed by Lawrence, the mortgagor, to Colton, subject to the payment of the mortgage, and Wells simply has the rights of Colton; that is, under the conveyance, in equity, he, at most, is the owner of the premises, subject to the mortgage. As prior lien-holder, Wells has the right to sell the whole mortgaged property; but clearly, we think, the

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

plaintiff can protect himself by the payment of so much of the debt as in equity he should pay.

As we have seen, the defendant Wells did not have the right to sell the 100 acres for the purpose of satisfying his lien. The court therefore erred in not granting such relief to the plaintiff by enjoining the sale on the execution. And it follows from what we have said that the court erred in permitting Wells to redeem from the plaintiff, for the reason that the full measure of the relief to which he is entitled is the sale of the whole of the mortgaged premises. As this case has been tried in this court as an action at law, no final decree can be entered in this court, and here we might stop; but, as we see no reason why this controversy cannot be adjudicated in this proceeding, we venture to suggest, without being bound absolutely thereby, that under the peculiar facts of this case equity demands that the Wells lien should be charged on both the tracts of land *pro rata*, in proportion to the value of each.

REVERSED.

67	435
109	636
67	435
116	88

BEEMS, ADM'R, v. THE CHICAGO ROCK ISLAND & PACIFIC
R'y Co.

1. **Witness: CREDIBILITY OF: QUESTION FOR JURY.** Whether witnesses are worthy of belief is a question for the jury, and not for the appellate court.
2. **Pleading and Evidence: VARIANCE: STOPPING SPEED OF CARS.** An allegation that a signal was given to "stop the speed" of the cars in question *held* to be supported by evidence of a signal which directed a total cessation of motion,—that being what is meant by stopping the speed.
3. **Railroads: INJURY TO CAR-COUPLER: DUTY OF FIREMAN TO AVERT DANGER AFTER ITS DISCOVERY: INSTRUCTION.** Plaintiff's intestate died of an injury received while attempting to couple cars on defendant's road. Plaintiff seeks to recover on the ground that defendant's employees were negligent in moving the cars with too much speed. The

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

court instructed the jury, in substance, that if the speed of the train was uncommon, and the danger unusual, and the speed was such as to indicate a strong probability that decedent would get hurt when he went between the cars, then it was the duty of the fireman to do whatever he could, by reasonable promptness, to avert the accident after he saw the decedent go into the position of danger. *Held* that the instruction was correct.

4. ———: EVIDENCE: RULES OF COMPANY. Certain rules of the defendant company regarding the duty of train-men in the management of trains construed, and *held* to have been properly admitted in evidence in this case on behalf of plaintiff.
5. ———: USUAL SPEED OF TRAINS: QUESTION FOR JURY. Whether the speed of the train in question was usual and proper under the circumstances was for the jury to determine from the evidence.
6. ———: DEATH OF EMPLOYEE THROUGH COMPANY'S NEGLIGENCE: EVIDENCE OF DAMAGES: LIFE TABLES. Where the evidence showed that the deceased, who came to his death through defendant's negligence, was twenty-five years of age, and that he was an active, industrious man, in good health, with a common education, and that at the time of his death he was earning from \$40 to \$45 per month, these facts were sufficient to authorize an award of substantial damages, without the introduction of life-tables to show the probable duration of decedent's life, had he not been killed; and, in the absence of a claim that the amount awarded was excessive, the verdict should not be disturbed.

Appeal from Cass Circuit Court.

THURSDAY, DECEMBER 10.

THIS is an action at law, in which the plaintiff, as administrator of the estate of Joseph Beems, deceased, seeks to recover damages of the defendant upon the alleged ground that the deceased, who was a brakeman in the employment of the defendant, came to his death by reason of the negligence of certain employes of the defendant in the management of an engine, while deceased was attempting to uncouple a car from the tank or tender of the engine. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for \$2,500. Defendant appeals.

Thos. S. Wright and R. G. Phelps, for appellant.

A. S. Churchill, for appellee.

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

ROTHROCK, J.—I. It is conceded that plaintiff's intestate was killed at Neola, on the defendant's railroad, by being run over by the wheels of the tender or tank to an engine, while attempting to uncouple a car next to the engine. He had been in the service of the defendant as brakeman on a freight train for six weeks, previous to which employment he had been for several months acting as a switchman in the yards of the defendant at Atlantic. The train on which deceased was employed arrived at Neola about five o'clock p. m. Some switching of cars was to be done, which was participated in by the deceased, the engineer and fireman. After several movements of cars, there remained attached to the engine two empty box cars, which were to be set back on the side track. To accomplish this, the engine and two cars were pulled east of the switch opening into the side track, until the hind car was some distance east of the switch, and then the engine and two cars were stopped. At this time deceased opened the switch, and went eastward to the west end of the tender, or, in other words, to the point of coupling between the tender and car attached to it, thus bringing himself a considerable distance east of the switch. As he reached this point he stepped between the tender and car, and at the same time the engine and car were started westward, and were moving westward while he was thus between the tender and car. At this time, also, the engineer was at his place on the south side of the engine, and the fireman was standing on the gangway between the tender and engine, facing towards the brakeman. After thus going between the tender and car, the deceased came out and moved along in a trot beside the tender, looking toward the coupling, and then went in again between the car and tender, when he was in some way caught under the tender, and his leg was taken off, and he received other injuries, of which he soon afterwards died. There was no effort made by the engineer or brakeman to check the speed of the train until after the deceased received his injuries.

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

The above statement of the facts attending the occurrence is taken from appellant's arguments, excepting that the distance in fact, as stated by appellant, which the cars were from the switch when deceased made the two attempts to uncouple the car, and the distance of the point from the switch at which he received the injury, are not given. We have omitted these statements, because there is some conflict in the evidence as to the distances named.

The petition sets forth the negligence complained of as follows: "That it was the duty of the enginemen to obey the signals given by the deceased when engaged in uncoupling and switching cars, and to move the train slowly and carefully in backing into a side track at Neola to leave cars; that deceased was engaged in uncoupling the cars to be left, and that while so engaged, he signaled the fireman and engineer to stop the speed of the defendant's train, which signal they failed to obey, and, instead of stopping the speed, as directed by said signal, said speed was constantly increased, and that, by reason of the neglect to obey the signal of deceased, and the increase of the speed, deceased was caught under the tender and run over, which injury resulted in his death. *

* * "

The principal question of fact in the case is whether the deceased signaled the fireman and the engineer when he went between the tender and the car the second time.

1. WITNESSES: credibility of: Two witnesses testify that he made a signal. question for jury.

The fireman testifies that no signal was given. The jury were warranted in finding from the evidence that a signal was given. Without following the argument of appellant's counsel upon the question of the truthfulness of these two witnesses, it is sufficient to say that their credibility was a question for the jury, and it is not for this court to say that the jury were not warranted in giving credence to their testimony. And we may further say that the jury were warranted from the evidence in finding that, if the signal had been obeyed, the deceased would not have been run

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

over and killed. In other words, we hold that the jury were warranted in finding that the time was not so brief between the signal and the injury, and the distance was not so short, that the deceased would have met the same fate if his signal had been observed and obeyed. We deem this sufficient upon the question made by counsel that the verdict is not supported by the evidence.

II. Conceding, as we must, that a signal was given just as the deceased went between the tender and car the second time, an important question for the jury to determine was whether the signal indicated to the brakeman that the engine should be brought to a stop, or whether the speed should be decreased. The witnesses described the signal to the jury by illustrations with their arms. Of course, these illustrations or movements of the arms cannot be reproduced so that we can put ourselves in the place of the jury, and determine what they indicated. Counsel for appellant complain because the defendant was allowed to introduce evidence that the signal was a direction to stop the engine; and from this we infer that the evidence was such as that the jury might find that the signal given by the deceased was a direction to stop. This is claimed to be contrary to the charge of negligence in the petition. We have copied above that part of the petition, and the language used is that the signal was to "stop the speed." Under this allegation we do not think the evidence was objectionable. To *stop the speed* is not to reduce or slacken it. It means to cease or stop the speed altogether. The instructions in which the question is presented to the jury, upon the theory that the signal was such as required the engineer to come to a full stop, are not, in our opinion objectionable nor erroneous. They are in the same line of thought with the petition. This cause has once before been in this court upon appeal, and, in discussing the questions then made, the signal was treated as a direction to decrease the speed; but the question as to a variance in the evidence from the allega-

2. PLEADING
and evidence:
variance:
stopping
speed of cars.

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

tions of the petition was not then presented nor considered. See 58 Iowa, 150.

III. The court, among other charges to the jury, instructed as follows: "If the decedent went in between

3. RAILROADS:
injury to car-
coupler: duty
of fireman to
avert danger
after its dis-
covery: in-
struction.

the cars the second time without giving any signal to those upon the engine, one of two things must necessarily be true, either that the train was then being moved at the proper rate of speed and without negligence, or else that the decedent

was himself negligent in stepping in without first giving the necessary order or signal to correct its movement; and, in either event, the plaintiff cannot recover unless it should be under a state of facts such as is spoken of in the next paragraph of this charge, being the paragraph numbered nine.

(9) One exception to the rule stated in the last paragraph is this: If the fireman from his place on the engine saw the decedent go in between the cars the second time, and knew that the speed of the train and all other circumstances were such as to indicate a strong probability that he would get hurt, it would be the duty of the fireman to do whatever he could, with ordinary promptness, to avert the accident, after he saw the deceased go into the position of danger, even though no signal may have been given him. If he saw and knew of any danger, and had within his reach or at his command the means to avert it, and failed to use such means with reasonable promptness and care, this would be negligence on his part which would make the defendant liable, even though the decedent may have been first negligent in going between the cars as he did. But, if the decedent gave no signal to slacken the speed of the train, or to stop it, and the rate of speed and other circumstances were not such as to suggest immediate or imminent danger to the decedent, then there would be no negligence on the part of those in charge of the engine in taking no steps to avert an accident. If it was a common occurrence in the ordinary course of business for brakemen to go between the cars when moving at

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

the rate these were going, the parties in charge of the engine would not be obliged to take any steps to avert a danger of which they have no notice or knowledge. If the fireman saw the decedent go in between the cars, and knew from the circumstances that there was unusual danger, the question what the fireman ought to do to avert such danger would depend on the circumstances. If the evidence shows that, on account of the position usually assumed, or sometimes assumed, by brakemen when thus between the cars, a sudden or abrupt stop would or might increase the danger to the brakeman, and if his position could not be seen, then the fireman would only be required to exercise an honest and reasonable judgment as to his duty and what, if anything, was best to be done. If the fireman saw the decedent go between the cars, and the accident occurred so soon after his going in that nothing could be done by the fireman, in the exercise of ordinary care, toward lessening or stopping the motion of the train, or in any other way, in time to avoid the accident, then there would be no liability on this state of fact, and the propositions of law stated in this ninth paragraph of this charge will have no application to this case."

Appellant says that the eighth instruction is manifestly correct, but that the ninth is clearly erroneous. It is insisted that this instruction authorized the jury to find that the fireman was negligent in not using means to avert the danger to the deceased, even if the cars were moving at such speed that it was proper for decedent to make the coupling. Or, to state the objection to the instruction in the language of appellant's argument, they say the purport and meaning of the instruction is that "deceased, possessed of the power to control the speed by use of signals, having determined that the speed was proper, and, the speed being proper, still defendant is liable if, there being any danger, it did not take means to avert it. Moving its cars at a proper rate of speed for the proximate safety of a brakeman charged with the duty of uncoupling them, defendant is still liable if it fails to avert

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

the danger still existing." In other words, counsel claim that this instruction requires the fireman or engineer, without signal, to stop a train, or reduce its speed, when a brakeman attempts to uncouple cars when the train is moving at a proper rate of speed to perform the act, because all uncoupling of moving cars is attended with some danger.

We have set out the whole of the ninth instruction as the best answer to the argument of counsel. All through the instruction the thought is kept prominent that if the speed of the train was uncommon, and the danger unusual, and the speed was such as to indicate a strong probability that decedent would get hurt, then it was the duty of the fireman to do whatever he could, by reasonable promptness, to avert the accident after he saw the deceased go into the position of danger. As we understand the instruction, it is not vulnerable to the objection made to it.

IV. The plaintiff was permitted, against the defendant's objection, to introduce certain rules of the defendant regarding the duty of train-men in the management of trains. They were in these words: "(1) The general direction and government of trains, from the time of receiving their passengers and freight, is vested in the conductor. Engine-men will be held alike accountable for any violation of the general rules of the company." "4. — : — : evidence: rules of company. (7) Engine-men will use great caution in backing up to take a train, or backing into a side track to take or leave cars, and will approach so slow that they may be coupled without moving the train of cars." "(10) Engine-men or firemen must look back frequently to see that all is right; and, in case a train becomes detached, great care must be taken to keep the forward part out of the way of the detached part, so as to prevent collision." It is urged that rule 7 was improperly admitted, because other evidence in the case showed that there were no cars on the side track which the two empty box cars could collide with, and that the rule has no application to a case like this. But the rule is fairly susceptible of

Beems, Adm'r, v. The Chicago, Rock Island & Pacific R'y Co.

the construction that great caution is required to be exercised in backing into a side track to take or leave cars, whether they are liable to strike other cars or not. And rule 10 requires engine-men or firemen to look back frequently to see that all is right. It is not restricted to looking back to avoid the consequences of the parting of a train. We think there was no error in admitting the rules in evidence. We approved the same ruling of the court upon the former appeal.

V. It is claimed that the court erred in leaving to the jury the question whether the speed of the train was usual and proper. We think otherwise. There was quite a conflict in the evidence as to the speed at which the train was backing. There was also evidence tending to show what was usual in such cases. It seems to us it was proper to allow the jury to determine the question.

VI. Next it is urged that there was no evidence of the probable life of the deceased. No life-tables were introduced in evidence, and it is claimed that without such evidence there was no proper basis for the computation of damages. The damages in cases like this never can be accurately estimated. It is the common practice to introduce life-tables that the jury may be advised of the probable duration of the life of a person of the age of the deceased. But, after all, the amount of damages is largely a matter of conjecture. No estimate can be made of the probable illness, sickness and inability to secure employment, nor can it be ascertained therefrom at what period in the prospective life the infirmities of age will reduce the capacity for labor. We do not think that the introduction of life-tables in evidence is essential to the recovery of damages. It is not claimed that the damages awarded to the plaintiff are excessive. The evidence shows that the deceased was twenty-five years of age, and that he was an active, industrious man, in good health, with a common education, and that at the time of his death he was earning from forty to forty-five dollars per month.

5. ———: usual speed of trains: question for jury.

6. ———: death of employee through company's negligence: evidence of damages: life-tables.

Wakefield v. Rotherham et al.

These facts were sufficient to authorize an award of substantial damages; and, in the absence of the claim that an excessive amount was fixed by the jury, the verdict should be allowed to stand.

AFFIRMED.

WAKEFIELD V. ROTHERHAM ET AL.

- 67 444
1141 29
1. **Redemption from Mortgage-foreclosure Sale: MISTAKE OF CLERK IN COMPUTATION: RECTIFICATION AFTER EXPIRATION OF YEAR.** Plaintiff was the owner of the land in question, and was entitled to redeem the same from a school-fund mortgage-foreclosure sale, at which the county was the purchaser; and he went to the clerk's office for that purpose, and paid the clerk the amount which he (the clerk) told him was necessary to effect the redemption. But by an error in the clerk's computation that amount was too small by about six dollars. Afterwards, and before the expiration of the year for redemption, defendant procured the certificate of purchase from the county, and subsequently obtained a sheriff's deed thereon. *Held* that the deed and certificate were properly canceled by the decree of the district court, upon plaintiff's petition, and that plaintiff was entitled to perfect his redemption by paying such additional sum as, added to the amount first paid, would be equal to the amount for which the land was sold, with ten per cent interest thereon from the day of sale to the date of such final payment.

Appeal from Cass District Court.

THURSDAY, DECEMBER 10.

THIS is an action in equity to cancel and set aside a deed to certain real estate executed by the sheriff of Cass county to the defendant Rotherham; also to cancel an assignment by the defendant Cass county to said Rotherham of the certificate of sale under which said deed was executed, and to establish the validity of a redemption of the premises from the sale by plaintiff. The judgment of the district court was for plaintiff. Defendants appeal.

L. L. De Lano, for appellants.

Temple & Phelps, for appellee.

REED, J.—During her life-time one Bridget Fahey was the owner of the real estate in question, and she executed a mortgage upon it to Cass county to secure an indebtedness to the school-fund. After her death it was sold by the administrator of her estate for the payment of the debts of the estate, and plaintiff was the purchaser. Before this sale the county had obtained a judgment foreclosing the school-fund mortgage, and after the administrators's sale the property was sold on a special execution issued on the judgment of foreclosure, and the county bought it in. This sale was on the twenty-second of November, 1881. In July, 1882, plaintiff went to the clerk's office for the purpose of redeeming the land from the execution sale. A computation was made by the clerk, by the direction of the attorney who appeared for the county in the foreclosure proceedings, of the amount which was required to be paid in making the redemption, and plaintiff was then informed that the amount required was \$379, and he paid this amount to the clerk, who gave him a receipt therefor, in which it is recited that the money was paid in full redemption of the land from said sale. As a matter of fact, however, the amount paid by plaintiff was about six dollars less than the amount for which the county had bought in the property, together with the interest thereon from the date of the sale, and it does not appear that the county has ever accepted the amount so paid by plaintiff. The school-fund judgment was not fully satisfied by the sale of the land. On the twentieth day of November, 1882, the defendant Julia Rotherham paid to the clerk the full amount for which the county had bid in the land, together with ten per cent interest thereon from the date of the sale, and he entered a receipt therefor in the judgment docket, in which it is recited that the money was paid in redemption of the land from the

sale under the special execution; and on the next day she paid to the county auditor the balance remaining due on the school-fund judgment after the sale of the land, and he assigned to her the certificate of purchase which the sheriff issued to the county at the time of sale, and on the twenty-third of the same month the sheriff executed to her a deed of the premises.

Plaintiff alleges in his petition that his failure to pay the full amount required to be paid in making the redemption was owing to the mistake of the clerk or county attorney in making the computation, and he offered to pay into court for the use of the county whatever amount should be found necessary to complete the redemption. By the judgment he was required to pay \$7.10, in addition to the amount which he had already paid, and the judgment provides that upon the payment of that sum the title to the premises should be quieted in him.

No question is made as to plaintiff's right to redeem the property at the time he paid the \$379 to the clerk; nor is it claimed that defendant Rotherham has any other or higher rights than the county would have had if it had retained the certificate of purchase, and the sheriff's deed had been made to it. But the question upon which the rights of the parties depend is whether plaintiff can now be permitted to perfect the redemption by paying the balance of the money required to be paid in redeeming the property. The terms upon which real estate may be redeemed from a sale under execution, and the mode of making the redemption, are prescribed by statute. The property may be redeemed by the owner at any time within one year. Code, § 3102. The terms of redemption in all cases will be the reimbursement of the amount paid by the then holder of the certificate, added to the amount of his own lien, with interest upon the whole at the rate of ten per cent per annum. Section 3106. The mode of making the redemption is by paying the money into the clerk's office for the use of the person entitled thereto; (section 3118;) and the clerk is required to give the redemp-

tioner a receipt for the money, stating the purpose for which it was paid, and to enter in the sale-book a minute of the redemption and of the amount paid. Section 3119.

Appellants contend that by the provisions of these sections the clerk is charged with no duty with reference to the redemption of the property, except that of receiving the money which is paid, and issuing the receipt therefor, and making the prescribed entry in the sale-book, and that it is the business of the redemptioner, and not of the clerk, to determine what amount is required to be paid in order to effect a redemption, and that, as plaintiff chose to act upon the information which was communicated to him, he assumed the risks as to its correctness, and is therefore responsible for the mistake which occurred, and hence is not entitled to be relieved against it. It is certainly true that plaintiff could redeem the land from the sale only by paying to the clerk the amount at which the county bought it in, with ten per cent interest thereon from the date of the sale to the date of the redemption; and it will be conceded that it was his business to determine what that amount was, and that the clerk was not charged with the duty of ascertaining or determining it, in the sense that his determination of it would be conclusive, of the rights of the parties. It does not follow, however, that plaintiff is not entitled to relief against the mistake which occurred in the computation of the amount. The payment was required to be made to the clerk, and he is the custodian of the record of the sale. This record would ordinarily have to be examined in determining the amount which must be paid to effect a redemption.

Plaintiff went to the clerk's office for the purpose of ascertaining this amount and of paying it to the clerk. In accepting the statement of the clerk as to the amount, he did simply what the majority of ordinarily prudent men would have done under like circumstances. He was guilty of no negligence in the matter. He paid the amount which he honestly believed was sufficient to make the redemption. His inten-

tion was to redeem the property, and he left the office believing that he had effected a redemption, and he knew nothing to the contrary until after the expiration of the year within which, by the provisions of the statute, the right to redeem might be exercised. The right of redemption is a valuable one, and, although statutory, it is favored by the law, and to hold that it was defeated by a trivial mistake like the one in question would be to ignore the spirit of the statute which created it. We think the district court rightly held that under the facts of the case the redemption might be completed after the expiration of the year allowed by statute.

The amount which plaintiff, by the judgment of the district court, was required to pay in perfecting the redemption was the difference between \$379 and the amount required to make the redemption at the time the payment was made, with ten per cent interest on that sum to the date when paid. Appellants contend that, as the redemption was not perfected by the deposit of the \$379 with the clerk, plaintiff should have been required, in perfecting it, to pay such sum as, added to the \$379, would amount to the sum at which the county bought in the land, with ten per cent interest thereon to the date of the final payment, and we think this position is correct. The county could not have accepted the \$379 without thereby admitting that the deposit of that sum with the clerk effected a redemption of the property. It can hardly be said, then, that the money was held by the clerk for the use of the county. It was held rather for plaintiff's benefit.

The cause will be remanded to the district court, with directions to so modify the judgment as to require plaintiff in perfecting the redemption to pay the amount at which the county bought the land, with ten per cent interest thereon up to the time of final payment; or, if the parties so elect, such modification will be made in this court. The costs of the appeal will be taxed to appellants.

MODIFIED AND AFFIRMED.

ELLSWORTH V. SAVRE.

1. **Execution: LEVY ON EXEMPT PROPERTY: WAIVER AND ESTOPPEL BY FAILURE TO OBJECT: FACTS NOT CONSTITUTING.** Under § 3072 of the Code, as amended by chapter 49, Laws of 1882, an execution defendant does not waive his right to hold property exempt from execution by failing to assert his claim when he learns of its seizure, unless the officer requires him to designate the property which he claims as exempt; nor does such silence work an estoppel, where it is not shown what, if any, expense was incurred by the officer in the keeping and sale of the property. *Angell v. Johnson*, 51 Iowa, 625, and *Moffitt v. Adams*, 60 Id., 44, distinguished.

Appeal from Worth District Court.

THURSDAY, DECEMBER 10.

THE plaintiff is the head of a family, and he claims in this action that in February, 1884, he was by occupation a farmer, and that the defendant, who is sheriff of Worth county, levied an attachment and an execution upon a horse, a wagon and harness, the property of the plaintiff, and which were exempt from execution. He brought this action in the form of an action of replevin. The property was not delivered to the plaintiff, but was sold at sheriff's sale by the defendant. The defendant denied that the plaintiff was a farmer, and claimed that the property was subject to levy upon said writs. He further claimed that the plaintiff was present when the property was seized by the defendant, and made no claim that it was exempt, and delayed making such claim for two weeks, and that he thereby waived any claim to the alleged exemption. There was a trial to the court, and a judgment for the plaintiff for the value of the horse, and a judgment for the defendant for the other property. Defendant appeals.

Blythe & Markley, for appellant.

Glass & Hughes, for appellee.

ROTHROCK, J.—There was some controversy at the trial upon the question as to whether the plaintiff was a farmer. The court must have been of the opinion that the evidence did not show that to be his occupation, because none of the property but the horse was held to be exempt. Under section 3072 of the Code, the head of a family is entitled to hold one horse as exempt, without regard to his occupation.

The only question in the case is, did the plaintiff, by his acts at and after the property was seized, waive his right to hold the horse exempt from seizure upon the writs? It appears that immediately after the levy the defendant informed the plaintiff thereof, and he made no claim of exemption, and he failed to assert such claim for some two weeks after the levy. Under the rule in the case of *Angell v. Johnson*, 51 Iowa, 625, this would be a waiver of the exemption. See, also, *Moffitt v. Adams*, 60 Iowa, 44. But section 3072 of the Code, under which those decisions were made, was amended by chapter 49 of the Acts of the Nineteenth General Assembly (1882) as follows: "Any person entitled to any of the exemptions mentioned in this section does not waive his rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless failing or refusing so to do when required to make such designation or selection by the officers about to levy." It was therefore the duty of the sheriff, when he reported the fact of a levy to the defendant, to require him to make a selection of any property that he claimed to be exempt.

It is claimed, however, that the plaintiff is precluded by the law of estoppel from making the claim, because he remained silent for two weeks, and thus allowed the sheriff to incur expense in keeping the property and advertising it for sale. If failure to make the claim can work an estoppel under the statute as amended, (a question we do not determine,) it can have no such effect in this case. It is not shown what, if any, expense was incurred by the defendant in keeping the property, and the return of the sheriff shows that

 Bennett v. Parker.

it was not advertised for sale until after notice of plaintiff's claim. The levy was made on the eighteenth of February, and the notice of sale was given on the second day of April. We think the judgment of the court below ought to be

AFFIRMED.

BENNETT V. PARKER.

67	451
79	487
67	451
83	128
67	451
104	690

1. **Appeal to Supreme Court: LESS THAN \$100: INSUFFICIENT CERTIFICATE.** This appeal, involving less than \$100, is dismissed, because the certificate of the trial judge is not sufficient in itself, but makes it necessary to resort to the record to ascertain what the question is on which an opinion is sought.

Appeal from Fremont District Court.

THURSDAY, DECEMBER 10.

THIS was an action upon a written instrument by which the defendant contracted to pay the plaintiff the sum of \$30, in consideration that the plaintiff would lay off and plat a town-site at his own expense, and procure from the Wabash, St. Louis & Pacific Railroad Company a side track on said town-site, and the location of a grain elevator. There was a trial by jury, and verdict for the plaintiff. Defendant appeals.

James McCabe, for appellant.

Stockton & Keenan, for appellee.

ROTHROCK, J.—The amount in controversy, as shown by the pleadings in the action, is less than \$100, and the cause comes to us on the following certificate: “* * * Did the court err in withdrawing from the consideration of the jury (which was done by the instructions) the matters pleaded as a defense in the third count or division of the

Atkinson v. Hancock & Co. et al.

original answer filed herein on the tenth day of October, 1884; there having been some evidence upon the trial tending to sustain the allegations made in said third count of said answer?"

We have repeatedly held, and rule twelve of this court requires, that in order to confer jurisdiction on this court in this class of cases it is necessary that the certificate shall set out and define the question which it is thought desirable should be determined; and we have held that the questions should be so explicit as to render an examination of the record unnecessary. *Votaw v. Corwin*, 62 Iowa, 39. Under these rulings it is manifest that we ought not to be required to examine the record to ascertain what question in the case we are called upon to determine. The certificate, without more, is unintelligible. The appeal will be

DISMISSED.

ATKINSON V. HANCOCK & Co. ET AL.

1. **Homestead: EXCHANGE: LIABILITY OF NEW ONE FOR FORMER DEBT.**
When one exchanges an old homestead for a new one of greater value, the new one, to the extent of such excess in value, may be subjected to the payment of a judgment against the owner procured prior to the exchange; but the difference in value in such case must be estimated at the time of the exchange, and not afterwards.
2. **Judgment against Holder of Naked Title: NO LIEN ON THE LAND.**
Where the legal title to land passes through a judgment debtor as a mere conduit, he having no interest in the land, the judgment does not attach thereto as a lien.

Appeal from Palo Alto Circuit Court.

THURSDAY, DECEMBER 10.

ACTION IN EQUITY. The plaintiff claims to be the owner of lots 1, 2, 9 and 10, in block 55, in the town of Emmets-

67	452
114	9

67	452
118	472

67	452
131	695

67	452
141	451

 Atkinson v. Hancock & Co. et al.

burg. The defendants Hancock & Co. own a judgment against one Cummins, which is claimed to be a lien on said lots. The court found for the defendants as to lot 2, and for the plaintiff as to the other lots, and a decree was accordingly entered. Both parties appeal. The defendants, however, took the first appeal, and therefore are regarded as the appellants.

John Jenswold, Jr., for appellants.

Soper, Crawford & Carr, for appellee.

SEEVERS, J.—I. In 1872, T. Cummins was the head of a family, and became the owner of a lot in the old town of Emmetsburg, on which there was a house, and the said premises were occupied by Cummins as his homestead. In 1873, Hancock & Co. obtained a judgment against Cummins, but it is not claimed that this judgment became a lien on the premises above described. In 1875, Cummins exchanged his old homestead for a new homestead in the new town of Emmetsburg. The conceded fact seems to be that, because of the location of a railroad through Palo Alto county, the location of the old town was not deemed desirable, and, by mutual agreement between the proprietors of the new and citizens of the old town, the latter agreed to move their buildings from the old to the new town, provided a lot in the latter was given to each of them. In accordance with this arrangement, the lot now in controversy was conveyed to Cummins, and he moved thereon his house from the old town, and thereafter occupied it as his homestead, until he sold and conveyed it to a person under whom the plaintiff claims.

The defendants do not dispute the homestead character of lot 1, but they say it is of greater value than the old homestead, and that, to the extent of such excess, it should be subjected to the payment of the judgment. Under the evidence this

1. HOME-STEAD: exchange: liability of new one for former debt.

position cannot be sustained. The old homestead, that is, the lot, was exchanged for lot 1, and the same buildings that were on the former were moved to and placed on lot 1. At the time the removal took place there was not much difference in the value of the two parcels of land. The evidence tends to show that the lot in the old town was not worth more than \$15, and we think the evidence shows that lot 1 was not worth, at the time it was conveyed to the plaintiff, more than \$25. The buildings were probably worth more prior to removal than afterwards, as the evidence shows that they were to some extent damaged in removing them. The difference in value of the two premises at the time of the exchange was insignificant and largely speculative. The old homestead is now a part of a farm, and the new is in a flourishing town, and has increased in value; but this we think is immaterial. The value of the new homestead at the time it became such is the test, and we are unable to find, under the evidence, that there was at that time any material difference in value between the old and new homesteads.

II. At the same time, or nearly so, that the exchange of homesteads was made, Cummins purchased lot 2, and paid \$25 therefor. The plaintiff claims that this lot became and was a part of the new homestead. But we think this claim cannot be sustained. The old homestead was exchanged for lot 1. The purchase of lot 2 was a separate transaction; and if it should be regarded, by reason of its location and the intention to use it, as a part of the homestead, it would still be liable to the judgment, because in such event we think the value of the new would exceed the value of the old homestead, and, besides this, lot 2 was purchased after the judgment was rendered, and no part of the proceeds of the old homestead was invested in lot 2, and therefore it became liable to the lien of the judgment, of which the plaintiff had constructive notice at the time he purchased said lot.

III. One Lawler was the owner of lots 9 and 10. He was a non-resident, and T. W. Harrison was his agent. Mr.

2. JUDGMENT Cummins purchased these lots of Harrison as
against hold- the agent for Lawler. The price was \$25 each.
er of naked
title: no lien
on the land. Harrison wrote to Lawler for a deed, and it was
 executed, and sent to Harrison. Cummins was the grantee
 therein. Harrison testified that Cummins paid the purchase
 money, and the deed was delivered to him. On the other
 hand, Cummins testifies that he informed Harrison that he
 could not pay for the lots, but that he had arranged to let
 one Slead have them at the same price he had agreed to pay,
 and he requested Harrison to return to Lawler the deed to
 him, and get a deed to Slead. This Harrison declined to do,
 as Cummins testifies, and thereupon Slead paid the purchase
 price to Harrison, and the deed was delivered to him, and
 thereupon Cummins conveyed the lots to Slead, under whom
 the plaintiff claims. The evidence of Cummins is to a con-
 siderable extent corroborated by that of Slead. But if it be
 conceded that Cummins paid the purchase money to Harri-
 son, and the deed was delivered to him, the fact remains that
 the money so paid belonged to Slead, and that the payment
 was made for the purpose of vesting the title to the lots in
 the latter. Cummins was, it is true, vested with the naked
 legal title. The conveyance was made to him as a matter of
 convenience. He was a mere conduit, and held the legal
 title in trust for Slead. Under such circumstances Cum-
 mins had no interest on which the judgment became a lien.
 His creditors can only get what he had, and what he had was
 of no pecuniary value. *Blaney v. Hanks*, 14 Iowa, 400.

The result is that the judgment of the district court must
 on both appeals be

AFFIRMED.

POTTAWATTAMIE COUNTY V. CARROLL COUNTY.

1. **Fines Imposed on Change of Venue:** WHAT COUNTY ENTITLED TO: CODE, § 3370. Certain criminal causes were taken on change of venue from the plaintiff to defendant county, where they were tried, and fines were imposed on the defendants. A transcript of the judgment and an execution in each case was sent to the plaintiff county, where the defendants resided, but before any levy was made the defendants paid to the sheriff the amounts of the several judgments, and he returned the executions and paid over the money to the clerk of the defendant county. *Held* that the fines were "collected" in the defendant county, within the meaning of § 3370 of the Code, and belonged to the treasury of that county.

Appeal from Carroll Circuit Court.

THURSDAY, DECEMBER 10.

On the petition of the defendants in certain criminal cases, in which the indictments were found in Pottawattamie county, changes of venue were granted, and the causes were removed to Carroll county, where the defendants were convicted of the offenses of which they were accused, and were each sentenced to pay a fine and the costs of the proceeding. The fines imposed in the several causes amounted in the aggregate to \$750. The clerk of Carroll county sent a transcript of each of the judgments to the clerk of Pottawattamie county, who filed the same in his office and entered them in the judgment docket. Executions were also issued by the clerk of Carroll county to the sheriff of Pottawattamie county. But, before any levy of the executions was made, the defendants paid to the sheriff the amounts of the several judgments, and he thereupon returned the executions to the office of the clerk of Carroll county, and paid over to said clerk the money so received from the defendants, and the amount of the fines was paid by the clerk to the treasurer of Carroll county. This action was brought by Pottawattamie county to recover the amount of said fines. The circuit court found for the defendant. Plaintiff appeals.

John H. Keatley, for appellant.

F. M. Powers, for appellee.

REED, J.—Section 3370 of the Code is as follows: “Fines and forfeitures not otherwise disposed of go into the treasury of the county where the same are collected, for the benefit of the school fund.” The fines in question are to be disposed of under this provision, and counsel agree that the question as to which of the counties is entitled to the money depends entirely upon which shall be regarded as the place of collection. The money was paid over by the parties from whom it was collected in Pottawattamie county, and counsel for appellant contends that the collection of the money was simply the receiving of it from the persons from whom it was collected, and therefore the place of payment is the place of collection. In a certain sense it is doubtless true that the receiving of the money by the sheriff was a collection of it. He had in his hands the executions which directed him to satisfy the judgments out of the property of defendants; and if he had proceeded to make the money by the sale of property belonging to the defendants, this, in the ordinary acceptation of the term, would have been the collection of the money. What he did in the premises was the equivalent of this, and, in the same sense, was a collection of the fines. We think, however, that the word “collected” in the section quoted, when used with reference to fines, means more than simply the receiving of the money. To fine is to impose a pecuniary penalty for a violation of the law. In legal sense, the term “to collect a fine” includes all the acts by which the penalty is imposed and enforced. It includes the judgment of the court, which is the means by which the penalty is imposed. It also includes whatever may be done under the process of the court for the enforcement of the penalty. Whatever is done, either by way of imposing the penalty or of enforcing it, is done in the course of the col-

Colby v. King, Adm'r.

lection of the fine. With this view of what is meant by the collection of a fine, there can be no doubt, we think, but that Carroll county should be regarded as the place where the fines in question were collected. They were imposed by the judgment of the court of that county, and the process for their enforcement was issued by that court, and whatever was done in the premises by the sheriff of Pottawattamie county was done in obedience to the mandates of those writs, and he was required by law to make return of his doings under the writs to the court of that county, and to pay over to its clerk the moneys received upon them. The whole proceeding for their collection was in the court of that county, and that must be regarded as the place of collection.

AFFIRMED.

COLBY V. KING, ADM'R.

1. **Estates of Decedents: FAILURE TO PROVE CLAIM: STATUTE OF LIMITATIONS: EQUITABLE CONSIDERATIONS.** Plaintiff held a note, secured by chattel mortgage, against the estate. He filed his claim in time, but neglected to prove it within the twelve months provided by § 2421 of the Code. *Held* that the claim was barred, notwithstanding plaintiff had permitted the mortgaged property to be sold in the belief that there was "plenty of property to pay the debts," and notwithstanding the administrator had agreed to see him paid. The discharge of the property was immaterial, and the promise of the administrator, whether made before or after the claim was barred, was incompetent to bind the estate.

Appeal from Humboldt District Court.

THURSDAY, DECEMBER 10.

ACTION AT LAW. Judgment for the plaintiff, and the defendant appeals.

W. W. Quivey and Wright & Farrell, for appellant.

G. H. Shallenberger, for appellee.

67	458
100	521

67	458
123	650
67	458
129	723

67	458
132	225

SEEVERS, J.—This is an action to recover or have allowed a claim against an estate. The defendant pleaded that it had not been filed and proved within twelve months of giving notice of the appointment of the administrator, as provided in section 2421 of the Code. The plaintiff claims that there are peculiar circumstances which prevented or excused him from proving the claim within that time, and therefore he is entitled to equitable relief. Code, § 2421. The claim consists of a promissory note executed by the deceased, secured by a chattel mortgage. The evidence tends to show that the plaintiff permitted the mortgaged property to be sold under the belief that there was “plenty of property to pay the debts.” The plaintiff testified that the defendant “agreed to see me paid. * * * King told me to file and prove my claim at the term of court for February, 1883; that he would investigate and pay all just claims.” Whether this last conversation took place before or after the claim was barred is uncertain. But it is immaterial in our opinion when it occurred. If not until afterwards, then the evidence simply shows that the defendant agreed to pay the claim. But an administrator cannot legally pay any claim unless it has been established as a claim against the estate in the manner provided by law. Both parties are presumed to so know. The promise, therefore, could not have been unconditional, and the plaintiff should have so known. The promise, conceding it to have been made as broadly as the plaintiff claims, as to which there are serious doubts, was one on which he cannot be permitted to rely to excuse his own negligence. Besides this, the plaintiff does not testify that, relying on such promise, he failed to prove his claim; but only that relying thereon he permitted the mortgage property to be sold. The fact that he had a mortgage and released the property is wholly immaterial. Again, the plaintiff did not rely on the promise, because he filed the claim in time, but negligently omitted to prove it. The circumstances do not, in our opinion, entitle the plaintiff to equitable relief.

REVERSED.

Burger, by his next Friend, v. Frakes.

BURGER, BY HIS NEXT FRIEND, V. FRAKES.

1. **Guardian: EXTENT OF AUTHORITY UNDER GENERAL APPOINTMENT.**

One who is appointed guardian of a minor in general,—that is, without any limitation of his authority, is charged with the care and custody of the person, as well as of the property, of his ward.

2. **Adoption: OF CHILD UNDER GUARDIANSHIP.** Where a guardian of the person and property of a minor child has been duly appointed, such child cannot be adopted by a third party without the guardian's consent. Whether it could be done with such consent, *quaere*.

3. **Parent and Child: POWER OF PARENT TO MAKE ORAL GIFT OF CHILD TO ANOTHER.** The law does not confer upon a parent the power to make a mere oral gift of his minor child to another; and the donee in such a case cannot recover the child from its duly appointed guardian.

4. ———: **ADOPTION: INHERITANCE.** Whether parents by adoption inherit from their adopted child the same as natural parents from a natural child, is a question not decided in this case.

*Appeal from an order made by Hon. H. C. Traverse,
Judge of the Circuit Court of the Second
Judicial District.*

FRIDAY, DECEMBER 10.

THIS is a proceeding by *habeas corpus* to determine the claims of the parties to the custody of the minor plaintiff. Upon the hearing, the circuit judge held that defendant was in law entitled to the custody of the minor, and so ordered. The order was made of record in the circuit court of Davis county. Plaintiff, the guardian and next friend of the minor, appeals.

Payne & Eichelberger and Jones & Steele, for appellant.

S. S. Carruthers, for appellee.

BECK, CH. J.—I. Aaron Burger, whom we shall designate as plaintiff, is the paternal grandfather of the minor, a

67	460
84	306
67	460
87	134
67	460
6127	630
127	631
67	460
135	470
135	482
67	460
132	496
6133	117

Burger, by his next Friend, v. Frakes.

a child four or five years old, whose custody is in controversy in this suit, and defendant is his maternal grandfather. The plaintiff was appointed guardian of the minor by the proper court. He claims in this action custody of the minor as the guardian of his person and property. Defendant claims the custody of the child under an act of adoption, made subsequent to the appointment of plaintiff as guardian, and without his consent, and upon the further ground that the mother who survived the father, before her death, gave the child to him.

The plaintiff disputes the validity of the act of adoption, and denies both the fact and validity of the gift of the child by the mother. Defendant contends that plaintiff is not the guardian of the person of the minor, claiming that his guardianship extends only to the property of the ward. This statement of the issues indicates the leading and decisive questions in the case, which are these: (1) Is the plaintiff the guardian of the person of the child? (2) Is the act of adoption valid and effective to confer upon defendant the right to the custody of the child? (3) Was there a valid gift of the child which confers upon defendant the right to its custody? There are other questions discussed by counsel, but they are subordinate and collateral. They will be hereafter stated, so far as it may be necessary to consider them in this opinion. We will proceed to the consideration of the questions we have above stated.

II. Is the plaintiff the guardian of the person of the child? The petition upon which the appointment of plaintiff was made prays that he be appointed guardian, without specifying the powers that shall be conferred upon him. The record of the appointment, the letters of guardianship and the guardian's bond are in the same general language, and do not prescribe his duties and powers. In the oath of qualification he undertakes to discharge the duties of guardian of the person and property of the minor. It must be conceded that plaintiff was

1. GUARDIAN:
extent of au-
thority under
general ap-
pointment.

Burger, by his next Friend, v. Frakes.

appointed as the guardian generally, without words of limitation or qualification. It cannot be doubted that a guardian so appointed, in the absence of a statute to the contrary, would be charged with the duties of a guardian of the person and property of the ward. The term "guardian," without words of limitation, describes one who is charged with the care and custody of the property and person of the ward. See Schouler, Dom. Rel., 436. Our statute does not provide for the appointment of a guardian whose powers shall be limited to the care of the ward's property, except in one case, viz., where the minor has property not derived from either parent. Code, § 2243. It is true that sections 2246 and 2250 prescribe that the guardian of the property of a minor shall give bond and must prosecute and defend actions for his ward. But, by the use of the term "guardian of the property," the sections are aptly applied to guardians generally, who have the care of the property and person of the ward, and to the single case of a guardian for the property only, contemplated in section 2243. The occurrence of the expression does not support the position that the general term "guardian" does not describe guardians who are charged with the custody of both the person and property of the ward. Section 2249 prescribes the power and authority of guardians of the persons of minors. This provision gives no support to the position that the statute provides for the appointment of guardians with authority limited to the property of the ward, except in the case contemplated in section 2243. The word "guardian" is obviously used in the statute as a general term, and applies to both guardians of the property and guardians of the persons of the ward.

It is not necessary to determine whether a minor may have two guardians, one of his person and the other of his property, as we hold that the plaintiff, being appointed guardian without limitation upon his power and authority, must be regarded as the guardian of the person and estate of the ward. It would appear probable that the law does not con-

Burger, by his next Friend, v. Frakes.

template an appointment in any case of two guardians. Code, § 2243, which provides for the appointment of a guardian of the property of a minor, doubtless contemplates that the parents should retain the care, custody and control of his person. It appears, too, that the appointment of two guardians would not operate to the advantage of the ward. The guardian having control of his person ought to determine as to his education and other matters involving the expenditures from the income and avails of his estate. If there should be a guardian of the property of the minor, he could impede or arrest the lawful acts of the other guardian pertaining to these matters. Disagreements and conflicts might arise in this way, which would be to the detriment of the ward.

III. The defendant made application, by petition, to the circuit court to be appointed guardian of the person of the minor. The clerk, in vacation, entered an order appointing defendant such guardian, but the court, in term, set the order aside. Defendant does not and cannot claim that the appointment is in force, or that under it he can claim to exercise any of the powers or duties of a guardian. The plaintiff insists that the proceeding, wherein the clerk appointed the defendant guardian, and the order of the court setting it aside, operate as an adjudication of the questions involving the power of the court to appoint a second guardian, and of the authority of the plaintiff to act as the guardian of the person of the minor. We waive the consideration of this question, as its determination becomes unnecessary in view of the conclusion we reach, that plaintiff is, by virtue of his appointment, the guardian of both the person and estate of the minor.

IV. We come to the consideration of the second question involved in the case, viz.: Is the act of adoption valid and effective to confer upon the defendant the right to the custody of the child? Code, §§ 2307-2311, provides for the adoption of children. Section 2307 prescribes that persons competent to make a will are author-

2. ADOPTION:
of child under
guardianship.

Burger, by his next Friend, v. Frakes.

ized to adopt the minor child of another, thereby conferring upon him "all the rights, privileges and responsibilities which would pertain to the child if born to the parents adopting in lawful wedlock." The other sections, excepting 2311, are in the following language:

"SEC. 2308. In order thereto, the consent of both parents, if living, and not divorced or separated, and if divorced or separated, or if unmarried, the consent of the parent having the care and providing for the wants of the child, or, if either parent is dead, then the consent of the survivor, or if both parents be dead, or the child shall have been or remain abandoned by them, then the consent of the mayor of the city where the child is living, or if not in a city, then of the clerk of the circuit court of the county where the child is living, —shall be given to such adoption, by an instrument in writing, signed by the parties or party consenting, and stating the names of the parents, if known, the name of the child, if known, the name of the person adopting such child, and the residence of all, if known, and declaring the name by which the child is thereafter to be called and known, and stating, also, that such child is given to the person adopting for the purpose of adoption as his own child.

"SEC. 2309. Such instrument in writing shall be also signed by the person adopting, and shall be acknowledged by all the parties thereto, in the same manner as deeds affecting real estate are required to be acknowledged; and shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the name of the parents by adoption as grantors, and the child as grantee, in its original name, if stated in the instrument.

"SEC. 2310. Upon the execution, acknowledgment and filing of record of such instrument, the rights, duties and relations between the parent and child by adoption shall thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth."

It will be observed that in these sections no mention of or reference to a guardian is made, if the child have one. It is not provided that by adoption a guardian may be robbed of his authority and relieved of his duties toward his ward. If these sections are held to have such effect, it must be done by construction of their language. Such a construction, practically, would have the effect to remove a guardian; to take from him the care and custody of his ward, and leave him, while still guardian, without authority, power or duties. The statutes declare that "guardians of the persons of minors have the same power and control over them that parents would have if living." The authority and power of parents are those of natural guardians having the care and custody of their minor children. Code, § 2241. Now, the construction of Code, §§ 2307-2311, contended for by counsel for defendant, giving these provisions the effect which authorizes an act of adoption without the consent and concurrence of the guardian, would operate to annul the authority and power of guardians over the persons of the wards. This, too, would be done without notice to them, by proceedings of which they could not be informed,—proceedings, too, that are not judicial in their character, and rest upon the assent of the person making the adoption, and a mere clerk who is not required to determine facts and exercise discretion thereon. And this construction gives to mere strangers the power of disposing of the custody of the minor, directing the course of descent of his property, robbing him of his father's name, and giving him a new name, all without the knowledge or assent of his guardian, whom the law has appointed to hold custody of his person, to look after his welfare, and to guard all his interests, and who stands in the place of a father to him. The result of the interpretation seems to us absurd. Certain is it that it would be subject to most gross abuse, and would in many cases result in great injustice.

The appointment of a guardian is a judicial act made with a view to the qualification of the person appointed, upon the

Vol. LXVII—30

Burger, by his next Friend, v. Frakes.

determination of the court that the interest and welfare of the ward will be promoted thereby. If the statute be interpreted as contended for by defendant, an unfit and designing man, who aims to become the heir of the minor possessing large property, may, by procuring the assent of the clerk of the court, or the mayor of the city, accomplish his purpose without the knowledge or assent of the guardian, to whom, by a judicial decision, the care and protection of the minor was committed. We will not further point out the abuses and injustice which might result under the sanction of the statute as interpreted by defendant.

This case illustrates the improper use to which the statute would be put. Defendant, it appears from the record, being dissatisfied with plaintiff's guardianship, made an attempt to supersede him by securing for himself the appointment as guardian of the person of the minor. But the order of the clerk making the appointment he coveted was set aside, and defendant was defeated in his attempt to gain his object in that way. It is probable that defendant anticipated this result. About ten days before the order was set aside, the same clerk who had appointed him guardian assented to and executed the act of adoption. This same clerk had issued the letter of guardianship to plaintiff, and of course well knew the conflict between the grandfathers for the custody of the child, and must have known that there were questions of right and law dividing them. Yet he solves all these, as he supposed, by assenting to the act of adoption; and we may well believe, as the law requires him to exercise no discretion upon the facts of the case, without any inquiry, whether the adoption would be just towards the minor sister, (for it appears that he had one,) in substituting his grandparents for her as the minor's heir in case of his death, and whether the best interests of the minor himself would be promoted. We discover by the history of the case what a clerk or mayor might do. His action would not be subject to review in any form, except probably for fraud in an action in chancery to

Burger, by his next Friend, v. Frakes.

set aside the act of adoption. But less determination and skill than is exhibited ordinarily to support frauds would conceal the motives and improper practice in such cases.

The contrary interpretation, to the effect that the act of adoption cannot be made when a minor has a guardian, excepting by his consent, or that it cannot be made at all in such a case, is, in our opinion, in harmony with justice and the good of minors. We may here say that we do not decide the question whether a minor having a guardian may be adopted at all. This question we reserve. But we are clearly of the opinion, and do decide, that if in such a case an act of adoption may be made at all, it must be with the assent of the guardian.

It will be observed that the provisions of the Code pertaining to adoption and guardianship of minors all relate to the same subjects; the control, care and custody of minors who have no parents living. They are therefore *in pari materia*, and should be so construed as to harmonize in all their parts; and, as in the case of all other statutes, that construction will be adopted which will give force and effect to all their provisions. The construction insisted on by defendant's counsel, while based upon the language of the provisions touching adoption, would give effect thereto, broader than that language, and would, to some extent and in some cases, nullify the Code, § 2249, and other sections pertaining to the appointment of guardians. As we interpret these statutes, Code, §§ 2307-2311 are operative in the case of minors not having guardians. Section 2249 and other sections maintain guardians in the exercise of their authority until they have been removed by proper proceedings, or their wards become of age. This force and effect, in harmony with the language, is given to all these provisions.

V. The third question in the case is this: Was there a valid gift of the child which confers upon defendant the

Burger, by his next Friend, v. Frakes.

3 PARENT
and child :
power of par-
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oral gift of
child to an-
other.

right to its custody? The gift upon which defendant's claim is based was oral, and made a short time before the death of the mother of the minor. It is sufficient to say that the law prescribes that a parent may provide by will for the care and custody of a minor child, and, as we have seen, may make disposition of it by assenting to an act of adoption. But we know no law that will authorize us to enforce a mere oral gift of a child made by a parent.

VI. The respective grandfathers of the child seem to have equal affection for it, and to be equally capable of bestowing upon it care and protection. We are not prepared to determine that its welfare would be promoted more by assigning it to the care of one than to the other. We think the defendant's zeal to retain the child has led him into the error of pursuing the course of adopting it, which, if successful, would affect the rights of his sister, thus subjecting him to the imputation of an act of injustice which would work to his own gain. But we doubt not that he was prompted by no such purpose and motive. Regarding, as we do, that each grandparent would give the child proper care, there is no ground for holding that the judge of the circuit court should have awarded the custody to defendant for the reason that the minor's welfare demanded such an order. The questions in the case are based upon the legal rights of the parties. The tender years of the child are such that it has formed no attachment to the defendant, the severing of which would wound its affections and sensibilities. Doubtless each grandparent would feel equally grieved by being deprived of the custody of his grandchild. It follows that there is no controlling question of love or affection in the case.

The foregoing discussion disposes of questions which are decisive of the case. Others need not be considered. The order of the circuit judge is

REVERSED.

 Burger, by his next Friend, v. Frakes.

SUPPLEMENTAL OPINION.

BECK, CH. J.—I. A petition for rehearing filed in this case demands attention as to some of the positions and arguments presented therein. It is complained that the foregoing opinion erroneously states that the ward of the plaintiff, in whose name this action is prosecuted, has a sister. This statement, it is true, is not sustained by the record, and the fact was erroneously inferred or stated upon a mistaken understanding of the abstract. But this error of fact in no measure affects the argument based upon it. While the child has no sister, it is true that he has other kin, who, in case of his death, would inherit his property, and if his foster parents became his heirs these relatives would suffer the injustice which the opinion shows would be done to the sister, which it assumes the child had. The argument we base upon the supposed existence of a sister is just as well supported upon the actual existence of the paternal grandfather, or other person, who, upon the child's death, would become its heir. While we regret the error of fact into which we fell, we are well satisfied that the force of the argument of the opinion is in no way affected by it.

II. Counsel for both parties in their arguments submitted upon the trial of the cause in this court concurred in the conclusion that, upon the adoption of a child in accord with the requirements of the statute, its foster parents become its heirs at its death. In other words, the rules of inheritance under the statute recognize the adopted child as though it were the offspring of the foster parents, to and through whom, in case of its death, its property would descend just as though it were their natural child. Counsel for defendant in the petition for rehearing, frankly admitting that this was his view of the law, now insists, having discovered his mistake, that this is an erroneous position, and that the course of descent from the adopted child is, under our statute, the same as though there had

4. PARENT
and child :
adoption : in-
heritance.

Burger, by his next Friend, v. Frakes.

been no adoption. We assumed in the foregoing opinion that the view of the law in which counsel for both parties concurred is correct; and, without considering or discussing the question, used language which expresses that doctrine. We are glad of an opportunity to modify and explain our language, and to state explicitly that we are not to be understood as deciding or expressing in the form of *dictum* that foster parents will inherit from adopted children under the rules of inheritance directing the descent of property of children to and through their natural parents. The question must be regarded as not having been decided or considered in the case,—it is left just as we found it. But this modification of the foregoing opinion, and concession to the views of defendant's counsel, has no effect whatever upon the argument against the validity of the act of adoption of plaintiff's ward by the defendant, based upon injustice to the kin of the child who would be cut off from the right to inherit its property. While such kin may not be defeated of rights as heirs, they may be defeated of other rights, both natural and legal, by an act of adoption of the character of the one in question; among which are the right to the custody and society of the child, and the right to direct its education and moral culture. These rights, the exercise of which would establish the character of the child and direct its mental and moral development, would be regarded as of far greater value than lands and goods by many whose affection and pride are concentrated in their kin.

III. Counsel for defendant urge many arguments in support of the position that defendant is entitled to the custody of the child for the reason that he has stronger affection for it than the plaintiff possesses, and, for this reason, is better qualified to direct its education and domestic and moral training. We need not pursue the inquiry to which we are thus invited. A court of competent jurisdiction has appointed plaintiff the guardian of the child. The plaintiff, as guardian, is entitled to the custody of his ward; and it is not com-

Rump v. Schwartz.

petent for a judge or court in a *habeas corpus* case to review the proceedings resulting in the appointment of plaintiff, nor to inquire whether he should be, in any manner, relieved of the duties and rights of a guardian, and whether the custody of the child should be given to another more capable or better fitted to receive it.

Other positions taken, and arguments in their support advanced by defendant's counsel, do not demand further consideration. We think that the doctrines we announced in the foregoing opinion demand no further discussion. The petition for rehearing is overruled.

REVERSED.

RUMP V. SCHWARTZ.

1. **Chattel Mortgage:** CLAIM THAT MORTGAGED PROPERTY WAS SEIZED UNDER, AND WRONGFULLY CONVERTED: ESTOPPEL BY PLEA IN FORMER ACTION. Where plaintiff, in a prior action against the defendant, pleaded that the proceeding under which defendant claimed to have acquired the property in question was a foreclosure of a chattel mortgage upon the property, and under such plea he (plaintiff) received all the rights and advantages which could have accrued to him if the proceeding had in all respects been regular, he cannot now be permitted, while retaining those advantages, to assert that defendant was a mere trespasser in that proceeding, or that he (plaintiff) was not divested of the property by the sale. The principle of *Deford v. Mercer*, 24 Iowa, 118, followed.

67	471
126	517

Appeal from Lee District Court.

THURSDAY, DECEMBER 10.

ACTION to recover the value of certain personal property. Plaintiff alleges that he gave defendant a chattel mortgage on said property to secure a promissory note for \$1,100, and that, default having been made in the payment of said note, defendant placed the mortgage in the hands of the sheriff of Lee county for foreclosure, who took possession of the

Rump v. Schwartz.

mortgaged property thereunder, and that defendant, after having caused the property to be seized by the sheriff, permitted a portion of it to go to decay and become worthless, through negligence and want of proper care, and converted the remainder thereof to her own use, without causing the same to be sold in the manner provided in the mortgage. Defendant in her answer admitted the execution of the mortgage and the seizure of the property thereunder, but denied the other allegations of the petition, and alleged that the property was sold at public sale by the sheriff in the manner provided for in the mortgage, and that the same was purchased by her husband, and that, after deducting the costs and expenses of the sale, the remainder of the sum for which the property was sold, to-wit, \$158.95, was credited on the note secured by the mortgage. She also alleged that plaintiff was estopped to deny the legality of the sale of said property, for the reason that, in a suit brought by plaintiff against defendant in the district court, which involved the balance due on said note and the title to a certain tract of land, plaintiff alleged and pleaded the foreclosure of said mortgage and said credit on said note. And the court found in its decree that said allegations were true; also that in said action plaintiff alleged that said foreclosure and credit estopped the defendant from pleading the provisions of the contract sued on in said case, which made time the essence of the contract. There was a trial to a jury, who found for plaintiff, and judgment was entered on the verdict. Defendant appeals.

Casey & Casey and Craig, Collier & Craig, for appellant.

Newman & Blake and Henry Lohmar, for appellee.

REED, J.—The verdict and judgment are sustained by the evidence, unless plaintiff is defeated of his right to recover by the matters set up by defendant as an affirmative defense.

Rump v. Schwartz.

The evidence given in support of said defense established the following state of facts: The parties entered into a written contract, by which defendant covenanted to sell and convey to plaintiff a certain tract of land for the price of \$2,200. For this amount plaintiff gave his two promissory notes for \$1,100 each, payable at different times. One of the stipulations of the contract was that in the event of the non-payment by plaintiff of said sums of money, or any part thereof, promptly at the time therein limited, defendant would be discharged from his undertaking to convey the land, and from all liability under the agreement. Afterwards plaintiff executed two chattel mortgages to secure said notes. The note first falling due was paid at its maturity, but, default being made in the payment of the other note, defendant caused foreclosure proceedings to be instituted thereon. No question is made as to the legality of the sale of the property covered by one of the mortgages. There was a seizure of the property covered by the other mortgage, and a formal sale thereof was made; defendant being the purchaser. The evidence, however, tended to show such irregularities in the conduct of the sale as would warrant the finding of the jury that it was void, and that defendant was liable as for the conversion of the property. The amounts realized from both sales, after deducting the costs and expenses, were credited on the note, but they were not sufficient to satisfy it. Plaintiff then tendered to defendant an amount of money sufficient to pay the balance remaining due thereon, and demanded a conveyance of the land; and, on defendant's refusing to make the conveyance, he instituted a suit in equity to compel a specific performance of the contract, and a judgment was entered compelling defendant to make a conveyance of the land. From that judgment defendant appealed to this court, but on the hearing of the appeal the judgment was affirmed. See *Rump v. Schwartz*, 56 Iowa, 611.

On the trial defendant asked the court to instruct the jury

Rump v. Schwartz.

that upon these facts plaintiff was now estopped to assert that he was not divested of the property by the foreclosure proceeding. But the court refused to give such instruction, and told the jury that if the facts essential to plaintiff's recovery were proven, his right of recovery was not defeated by the fact that plaintiff had pleaded the foreclosure of the mortgage in the former action. The only question argued by counsel is as to the correctness of these rulings. In our opinion the rulings are erroneous. Plaintiff was entitled to relief in the former action only in case he could show that the provision of the written agreement making time of the essence of the contract had been waived by defendant. To establish such waiver he alleged that, after his default in the payment of the note had occurred, defendant had foreclosed the mortgages and sold the property and credited the proceeds of the sales on the note, and his tender was of the remainder due upon the note after deducting those credits. He not only asserted that the mortgages had been foreclosed, but claimed credit for the proceeds of the sales, and upon these facts the court adjudged that he was entitled to relief. Having once asserted that the proceedings under which defendant claimed to have acquired the property was a foreclosure of the mortgage, and having demanded and received all the rights and advantages which could have accrued to him if the proceeding had in all respects been regular, he cannot now be permitted, while retaining those advantages, to assert that defendant was a mere trespasser, or that he was not divested of the property by the sale. He is in precisely the same position he would have occupied if he had received and retained the proceeds of the sale; for he has demanded that they be applied to his use and benefit, and they have been so applied. The case is clearly within the principle laid down in *Deford v. Mercer*, 24 Iowa, 118. See, also, the cases cited in the note to that case.

The judgment will be reversed, and the cause will be remanded to the district court for further proceedings in that court.

REVERSED.

THE STATE V. FRY ET AL.

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| 127 | 441 |
1. **Criminal Evidence: ASSAULT: ILL FEELINGS ON PART OF DEFENDANTS.** In cases of assault it is always competent to show previous ill feeling, bad blood, or threats, as tending to show a probable motive for the commission of the crime. And where the assault was made upon a son, and the defendants were indicted jointly therefor, evidence of threats made by one of them against the father and his family was properly admitted.
 2. **Criminal Law: TIME NOT ESSENTIAL: INSTRUCTION.** Where time was not essential in an indictment, it was not error to instruct the jury that they must find that the crime was committed at about the time charged, or at any time within three years prior to the finding of the indictment;—that being the time prescribed by the statute of limitations for the crime in question.
 3. —: **ALIBI: BURDEN OF PROOF: INSTRUCTION.** An instruction to the effect that defendants had the burden of proof to establish an *alibi*, but that they need not establish it beyond a reasonable doubt, but that if, upon the whole case, the testimony raised a reasonable doubt as to the defendants' presence at the time and place where the assault was committed, that, of course, would create a reasonable doubt as to their guilt, and would entitle them to an acquittal, held as favorable to defendants as they could demand. See cases cited in opinion.
 4. —: **REASONABLE DOUBT: INSTRUCTIONS.** Where the ordinary and oft-approved instructions concerning reasonable doubt have been given to the jury, it is not necessary, though requested by defendants, to advise each juror that he is to act on his own convictions, and not concur in a verdict which is against his judgment.

Appeal from Kossuth District Court.

THURSDAY, DECEMBER 10.

THE defendants were tried and convicted upon an indictment for an assault with intent to maim, and they appeal.

Parsons, Perry & Sherman, for appellants.

A. J. Baker, Attorney-general, for the State.

ROTHROCK, J.—I. The principal ground relied upon by the defense for a reversal of the judgment is that the verdict

is not supported by the evidence. Robert M. Walker, the prosecuting witness, was, at the time of the alleged injury, about seventeen years of age. He testified that on Sunday, the seventeenth day of September, 1882, he was on the open prairie in Kossuth county herding cattle, and that, while so employed, the defendants came to him, threw him on the ground, unbuttoned his pants, and cut his *scrotum* so that one of his testicles passed through the opening made by the cutting. He testified that this occurred at ten or eleven o'clock in the forenoon; that the defendants wore masks upon their faces; that the only conversation between him and the defendants consisted of Herrick asking him if he was herding, and how many cattle he had in the herd. Walker was acquainted with both of the defendants, and claimed upon the trial that he was able to identify them as the guilty parties. There is no dispute about the injury, and that it was of a very serious character. Walker was the only witness who identified the defendants as the guilty parties. Both of the defendants testified as witnesses on the trial, and denied that they were guilty; and several members of their respective families, as well as themselves, stated that they were not away from their homes on the seventeenth day of September, 1882, except at such time in the day as that they could not have committed the crime. On the other hand, it was shown that the father of Walker had previously had some difficulties with the defendants, and that there was ill feeling by defendants towards him and his family. Walker in his cross-examination stated that he told the grand jury that he was not positive who the men were who assaulted and injured him. It appears in evidence that the defendant Fry lived about one-half mile from the place where Walker claims he was injured, and Herrick lived in the same neighborhood. There was evidence tending to show that the defendants were men of good character, and also evidence to the contrary. There are other circumstances disclosed in evidence, but the foregoing are the leading and prominent facts in the case. We

The State v. Fry et al.

are not prepared to say that the district court should have set aside the verdict as not supported by the evidence. All of the witnesses who testified for the defendants in support of an *alibi* may have been truthful, and the defendants may nevertheless be guilty. Absence from their homes for a very brief period would enable them to commit the crime, and this might well occur without the observation of other members of their families, and, although their faces were masked, Walker might well recognize them by the tone of their voices, their size, their gait when walking, and by other means.

II. It is claimed that the evidence of Peter J. Walker, the father of the prosecuting witness, as to the threats of the defendants, should have been excluded as incompetent. We think otherwise. In such cases it is always competent to show previous ill feeling, bad blood, or threats, as tending to show a probable motive for the commission of the crime; and threats or ill feeling towards the father of children to injure him and his family would surely be competent evidence on a criminal charge for an injury to one of the children. The fact that these difficulties with the defendants were about distinct matters as to each of the defendants did not render the evidence incompetent. The defendants were tried jointly, and evidence against either was competent.

III. It is further claimed that the court erred in permitting the state, in rebuttal, to introduce evidence as to threats by one of the defendants. The order in which evidence is introduced to the jury is, within certain limits, discretionary with the court. If the court had refused to allow the defendants to introduce counter-evidence, there might be some ground for holding that there was an abuse of discretion. The record does not show that there was any such refusal.

IV. In the second paragraph of the charge to the jury the court instructed them that they must find that the crime was committed on or about the time charged, or at any date within three years prior to the find-

1. CRIMINAL
evidence: as-
sault: ill feel-
ings on part
of defendants.

2. CRIMINAL
law: statute
of limitations:
instruction.

The State v. Fry et al.

ing of the indictment. It is claimed that this part of the charge is erroneous. It is the formula usually employed by the district courts in this state when time is not essential; and a conviction may be had if it be shown that the crime was committed at any time within the statute of limitations.

V. In instructing the jury upon the question of *alibi*, the court used this language: "No. 13. In addition to

3. —: *alibi*:
burden of
proof: instruc-
tion.

other evidence introduced by the defendants, they have produced testimony to show what in law is known as an *alibi*, which is simply the fact that, at the time the crime with which they are charged was being committed, they were at another and different place from that where the transaction took place. The burden of establishing an *alibi* is cast upon the defendants, and the evidence introduced to sustain it should outweigh the proof introduced by the state tending to show that the defendants participated in the crime. They are not bound to establish such defense beyond a reasonable doubt; but if, upon the whole case, the testimony raises in your minds a reasonable doubt that the defendants were present at the place where the assault was committed, that of course, would create a reasonable doubt as to their guilt, and would entitle them to an acquittal." This instruction is complained of by defendants. It is fully as favorable to the defendants as they had any right to demand. See *State v. Bruce*, 48 Iowa, 530; *State v. Hamilton*, 57 Id., 596; *State v. Reed*, 62 Id., 40; *State v. Hemrick*, Id., 414.

VI. Lastly, it is urged that the court erred in refusing to charge the jury, at the request of the defendants, as

4. —: rea-
sonable
doubt: in-
structions.

follows: "You are told by the court that each juror, under his oath, must vote according to his own conviction, and the doubt with which he has to do is the doubt in his own mind; and, if a reasonable doubt arises in his mind, or fails to arise, he should vote accordingly." The instructions given by the court to the jury on the question of reasonable doubt are in the usual form, which this court has time and again approved, and we

 Davis v. Hull et al.

think they were sufficient. It is not necessary that each juror should be advised that he is to act upon his own convictions, nor to caution him that he should not concur in a verdict which is against his judgment.

AFFIRMED.

 DAVIS V. HULL ET AL.

1. **Injunction to Restrain Cutting Timber: FORMER LICENSE: ESTOPPEL.** Because the owner of real estate has permitted another for several years to cut and remove timber therefrom, he is not thereby estopped from afterwards preventing him by injunction from continuing to do so.

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Appeal from Boone Circuit Court.

THURSDAY, DECEMBER 10.

THE object of the action is to restrain by injunction the defendants from cutting and removing timber growing on land owned by the plaintiff. An injunction was issued, which, at the hearing, was dissolved, and the plaintiff appeals

E. L. Green, for appellant.

Hull & Whitaker and Geo. G. Wright, for appellees.

SEEVERS, J.—In 1868 the defendant Hull sold and conveyed to the plaintiff a certain parcel of real estate, on which there were trees and timber growing and standing. The defendants undertook and were engaged in cutting down and removing such timber, and the plaintiff sought to enjoin them from so doing. The defendants admitted the material allegations of the petition, but pleaded, as a defense, that prior to the execution of the conveyance the defendant Hull owned the real estate, and that he sold and agreed to convey the land, except the standing trees and timber thereon, which,

by the terms of the contract, were reserved; that by mistake such reservation was not mentioned in the conveyance, and the defendants asked that it be reformed in this respect so as to set out the true contract; that ever since the date of the conveyance the defendant "Hull has cut and removed more or less timber therefrom every year, and plaintiff has always known and acquiesced therein," until a few days prior to the commencement of this action. The statements in the answer were denied by a reply. The circuit court determined that the conveyance could not be reformed, but found and adjudged that the timber growing upon the real estate was the property of the defendant Hull, and therefore dissolved the injunction. We concur with the circuit court that under the evidence the conveyance cannot be reformed; and this is substantially conceded by the appellees, because no appeal has been taken by them, and their counsel ask an affirmance of the judgment of the circuit court solely on the ground of estoppel.

There is evidence tending to show that prior to the execution of the conveyance it was agreed that the timber should be reserved, and there is evidence tending to show that there was no such contract or reservation made; but the plaintiff testifies that he "agreed to let him (Hull) have the timber on the brow of the hill, where it was level, and he was to take the timber off and let me fence it. He got all the timber that he agreed for." The evidence introduced by the plaintiff tending to show the contract and reservation is competent and material only for the purpose of reforming the conveyance, but the conveyance cannot, in any respect, be contradicted or varied thereby. The effect of the conveyance is to vest the legal title to the timber growing on the land in the plaintiff. This being so, the estoppel relied on is based solely on the fact that the defendants cut and removed timber from the real estate and the plaintiff acquiesced therein. The proposition, then, is that, if the owner of real estate permits another occasionally for several years to cut down and remove timber

Sweezy v. Stetson et al.

therefrom, he is estopped thereby from thereafter preventing him from so doing by legal means. This cannot be the rule, and counsel have failed to cite authorities in support of the claimed estoppel; and we think there is nothing on which it can be based. The plaintiff admits, it is true, that he agreed to let the defendant have a certain portion of the growing timber, but this admission is so qualified that it does not aid the defendants, and cannot be invoked in aid of the estoppel.

REVERSED.

SWEZEY V. STETSON ET AL.

1. **Former Adjudication: ESTOPPEL: INSTANCE.** Where an appeal was taken from a justice's judgment, and one of the parties procured a judgment of dismissal on the ground that the judgment appealed from was void for want of jurisdiction in the justice to render it, *held* that such party could not in another proceeding between himself and appellant be heard to say that the judgment appealed from was valid.

Appeal from Buena Vista Circuit Court.

THURSDAY, DECEMBER 10.

ACTION to enjoin the enforcement of a judgment rendered by a justice of the peace and to declare it void. A demurrer to the answer of defendants was sustained; and, as they stood upon their pleadings and refused to answer further, judgment was entered against them, from which they appeal.

Robinson & Milchrist, for appellants.

C. D. Golsmith and *Lot Thomas*, for appellee.

BROCK, CH. J.—I. The petition alleges that one McKenzie brought an action of replevin against defendant Stetson before a justice of the peace; that plaintiff was the surety upon the

VOL. LXVII—31

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67 481
128 139

replevin bond; that in the action a judgment was rendered against plaintiff for the amount of the value of defendant's (Stetson's) interest in the property, the justice holding that he had jurisdiction so to do; that plaintiff appealed from the judgment; and that the circuit court dismissed the appeal upon Stetson's motion asking for the dismissal, on the ground that the justice of the peace had no jurisdiction of the case, and there was therefore no valid judgment from which an appeal would lie. The answer of defendant expressly admits all these allegations, except those averring the ground of the motion and judgment of dismissal; but, as there is no denial thereof, such allegations must be taken as admitted. In another count of the answer the proceedings before the justice are pleaded, showing a trial, the judgment in favor of Stetson as against plaintiff, the taking of the property upon the writ of replevin, and other matters that need not be here stated.

II. We think the demurrer was rightly sustained. Stetson obtained an adjudication to the effect that the justice of the peace had no jurisdiction to render the judgment against plaintiff. After that adjudication Stetson cannot, in the face of the decision which he obtained, insist that the judgment is valid. Both he and plaintiff were parties to the proceedings on the appeal. He insisted that the justice had no jurisdiction and that the judgment was void, the plaintiff claiming the contrary. The circuit court adjudged that the judgment was void for want of jurisdiction of the justice. This adjudication bound both parties, and remains unreversed. Equity will not permit Stetson to turn round and attempt to enforce that judgment.

III. But defendants' counsel insist that plaintiff, having signed the replevin bond, thus enabling the plaintiff in replevin to take the property which has not been returned, and having insisted upon the jurisdiction of the justice, cannot now deny it. That position would do very well if the adjudication of the circuit court were not in the way. That

Heitz v. Atlee.

matter was settled by the adjudication, which remains unreversed. In the circuit court plaintiff insisted, by his appeal, that the justice had jurisdiction. Stetson maintained that he had not, and that the judgment was void. Now Stetson turns round and declares that the judgment is valid. Parties will not be permitted to play fast and loose in this manner, to obtain relief by an adjudication of a court, and afterwards to seek other relief by overthrowing the adjudication which was had in their favor. As between the parties, the adjudication of the circuit court had the effect to declare invalid the judgment against plaintiff. Equity will not now permit him to enforce it. The fact that property was taken in the proceeding cannot change the effect of the adjudication. If Stetson is entitled to recover it or its value, he must pursue some course other than an attempt to enforce a judgment which, as between him and plaintiff, has been adjudicated to be void.

AFFIRMED.

HEITZ V. ATLEE.

1. **Surety: DISCHARGE OF BY CREDITOR'S RELEASE OF FUND CHARGED WITH PAYMENT OF DEBT.** The release by a creditor of a collateral security operates to discharge a surety for the same debt to the extent of the security released, unless the surety consents to such release. So held in this case, where a receiver had in his hands funds sufficient to pay the debt, and he had been ordered by the court to pay it, but the creditor, without the consent of the surety, accepted a portion of the amount due, and receipted to the receiver for the whole debt, which receipt the receiver used in making his settlement and procuring his discharge.

Appeal from Lee District Court.

THURSDAY, DECEMBER 10.

ACTION upon a promissory note executed to the plaintiff by one I. R. Atlee and signed by the defendant as surety. The

Heltz v. Atlee.

defendant for answer averred in substance that the plaintiff took a chattel mortgage from the principal, I. R. Atlee, as security; that he obtained a decree of foreclosure, and by the decree he obtained a lien upon a fund in the hands of a receiver, which fund was more than sufficient to pay the plaintiff, and that the plaintiff executed to the receiver a receipt in full of the decree. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Craig, Collier & Craig and *S. M. Casey*, for appellant.

Miller & Son, for appellee.

ADAMS, J.—The undisputed evidence showed that in the action in which the plaintiff's decree of foreclosure was obtained a receiver was appointed to take charge of and sell the mortgaged property; that he did sell it, and realized a large sum of money, which was more than sufficient to pay the plaintiff and discharge all prior liens; that the plaintiff's decree was for \$1,214.45; that the plaintiff, however, accepted \$875.65, and executed to the receiver a receipt in full for his decree. After verdict for the plaintiff, the defendant moved for a new trial, on the ground that the verdict is not supported by the evidence. The court overruled the motion, and the defendant assigns as error that the verdict is not supported by the evidence. The defendant insists that in the action of foreclosure against I. R. Atlee the note became merged in the decree, so far as I. R. Atlee was concerned, and that the execution of the receipt to the receiver in full of the decree became, when filed in court by the receiver, a virtual satisfaction of the decree; that the plaintiff thereby lost all further remedy against I. R. Atlee, and cannot now be allowed to recover against his surety.

The mere receipt of a portion of an acknowledged debt, though accepted at the time as full payment, does not preclude the creditor from recovering the balance. But whether this

rule is applicable where the claim has been put in judgment, and sufficient money to pay it has passed into the hands of a receiver as trustee of the creditor, and the creditor, with full knowledge of the fact, and in the absence of fraud, accepts a portion of the debt, and executes a receipt to the receiver in full, and the receipt is filed in court as a basis of the receiver's discharge, is a question which, in the minds of some of the members of the court, admits of doubt. But we do not think that the case is such that we are necessarily required to determine it.

It is undisputed that the execution of the receipt, under the circumstances, operated as a release of the plaintiff's lien upon the fund in the receiver's hands. Now, the release of a collateral security operates to discharge, for that much, a surety for the same debt, unless the release is made with the surety's consent. As to whether the plaintiff in the case at bar released his lien for the unpaid balance with the defendant's consent is a question upon which the parties differ. The plaintiff admits that the defendant told him that he had a judgment for the whole amount, and not to take less; but he says that this was after he had already signed the receipt. The defendant testified that the plaintiff complained to him that the receiver would not pay him; that he told him to go to the judge; that the judge had ordered the receiver to pay it, and would make him pay it; and that he told him not to take any until he could get the whole. This, it appears, was when the plaintiff was complaining that the receiver would not pay him, and must have been before the plaintiff had settled with the receiver. The defendant's testimony upon this point is not expressly denied. The plaintiff relies mainly upon a certain written agreement signed by the defendant and others, the effect of which was to bind certain mortgagees to make a rebate from their claims. It is not contended that the agreement bound the plaintiff. He refused to sign it, or to become a party to it in any way. His position is that, while it did not bind him to make a rebate,

Heitz v. Atlee.

it allowed him to do so, and that the defendant, in signing the agreement, consented to the plaintiff's making a rebate.

The facts which gave rise to the making of the agreement remain to be stated. I. R. Atlee had been doing business as a merchant, and became involved. He had borrowed money of the Bank of Fort Madison, and also of the plaintiff, Heitz. The defendant had become surety for both loans. As I. R. Atlee's embarrassment increased, he executed a chattel mortgage to the bank and another to Heitz. He also executed chattel mortgages to other creditors, but not to all, and among the unsecured were E. S. Jaffrey & Co. They attached subsequently to the execution of the mortgages, and brought an action to set aside the mortgages as void. The mortgagees filed cross-petitions, and asked for a foreclosure. A receiver was appointed, and the goods were converted into money. Some of the mortgagees, having apprehension as to whether the mortgages would be sustained as against E. S. Jaffrey & Co.'s attachment, formed the plan of acquiring E. S. Jaffrey & Co.'s claim. To accomplish this it was thought necessary that the mortgagees should not demand the full payment of their mortgage claims out of the funds in the receiver's hands, but that they should make a *pro rata* rebate, and use the fund released by the rebate in paying for the E. S. Jaffrey & Co. claim. An agreement for a *pro rata* rebate was drawn up, and signed by all the mortgagees except the plaintiff. He was asked to sign it, but refused. The others, however, proceeded without him. The claim of E. S. Jaffrey & Co. was purchased, and an assignment thereof was made in trust to the defendant, J. C. Atlee. When the time came for payment by the receiver, it appears that he claimed that the plaintiff should make a *pro rata* rebate, like the other mortgagees, and made that a pretense for withholding payment altogether. The plaintiff finally yielded, and accepted a portion of his claim as a full payment of the whole. As to whether the defendant ever asked the plaintiff to sign the agreement does not appear, nor would the case be different

Heltz v. Atlee.

if he had. The agreement was devised as a part of the plan of acquiring the E. S. Jaffrey & Co. claim. The defendant was, we think, interested in the acquiring of the claim. That claim was being asserted as against the mortgages, and two of the mortgages were given to secure claims upon which the defendant was surety. But, whatever desire, if any, the defendant had that the plaintiff should sign the agreement in the outset, he could, so far as we can see, have had no such desire at the time the defendant settled with the receiver and released his lien. The E. S. Jaffrey & Co. claim had been acquired, and the rights of all parties had been adjudicated. It was for the defendant's interest that the plaintiff should be paid in full from the funds in the receiver's hands according to the adjudication. It is easy to believe, as he testified, that he objected to the plaintiff's making any release, and we are unable to discover the slightest evidence to the contrary.

There is some evidence tending to show that the defendant told the plaintiff that he would pay him the difference between what he would get from the receiver and the principal of his claim, but there is no evidence that the defendant told him so after the E. S. Jaffrey & Co. claim had been acquired and the rights of all parties had been adjudicated. If the defendant told him that before, it could not properly be construed into a consent afterwards. The circumstances had materially changed, as the plaintiff well knew. We think that upon the undisputed evidence the plaintiff is not entitled to recover.

REVERSED.

SWEETZER & CURRIER V. HARWICK ET AL.

1. **Mechanic's Lien: PETITION TO ESTABLISH BY AMENDMENT IN LAW ACTION: MISJOINDER: PRACTICE.** No other cause of action can be joined with an action to establish a mechanic's lien. (Code, § 2510.) Hence, where an action at law was begun against one of the defendants upon a promissory note, and plaintiffs afterwards filed an amendment bringing in other parties, and seeking the foreclosure and establishment of a mechanic's lien, *held* that a motion to strike out the amendment, or else to compel plaintiffs to elect on which cause of action they would stand, was properly sustained; and, when plaintiffs refused to elect, the court was justified in striking the amendment from the files and in proceeding with the original cause of action. Plaintiffs should have elected on which cause they would stand, or else they should have filed separate petitions, as provided by section 2634 of the Code.

Appeal from Buena Vista Circuit Court.

THURSDAY, DECEMBER 10.

THE plaintiffs commenced an action against the defendant T. J. Harwick. An amendment to the petition was afterwards filed making the other defendants parties. A motion to strike the amendment from the files was sustained. Plaintiffs appeal.

Robinson & Milchrist, for appellants.

Clarke & Ervin, for appellees.

ROTHROCK, J.—The original petition was an action at law against the defendant T. J. Harwick, and demanded judgment against him upon a promissory note. The action was aided by attachment, and certain personal property was levied upon. Afterwards the plaintiffs filed an amendment to their petition, in which they made May Harwick, T. F. Harwick and the Farmers' Loan & Trust Company new parties to the action. In this amendment the plaintiffs, in addition to a judgment against T. J. Harwick, as claimed in the original

petition, demanded a judgment against May Harwick for the consideration which formed the basis of the promissory note. The consideration was alleged to be certain fence wire and a pump, which were used in improvements on land the title to which was in May Harwick, and it was alleged that said T. J. Harwick purchased said fence wire and pump with the knowledge and consent of said May Harwick, and that she, and her interest in the land upon which said improvements were placed, were bound for said improvements. It is also averred that the land was conveyed to May Harwick by T. J. Harwick for the purpose of hindering, delaying and defrauding the creditors of T. J. Harwick. An account for a mechanic's lien was exhibited with the amendment to the petition, and a demand was made that said lien be established by the proper decree. It was averred that the other defendants had some claim or interest in the land, but that whatever rights they had were inferior and junior to the plaintiffs' claim for a mechanic's lien. The plaintiffs moved the court to transfer the cause to the equity side of the court. Pending this motion the defendant T. J. Harwick filed a motion to strick the amended petition from the files, upon the ground, among others, that the "original petition sets forth a cause of action at law against the said defendant only, this cause of action being a promissory note executed by defendant to plaintiffs, while this so-called amendment sets out a cause of action in equity, affecting other parties not named in the original petition, asking an equitable remedy for a different right than the one alleged in the original petition." The motion was also in the alternative, and demanded that the plaintiffs be required to elect to proceed on one of the causes of action set forth in the petition. No election was made, and the motion to strike the amendment was sustained. A judgment was afterwards rendered against T. J. Harwick on the promissory note, and the plaintiffs demanded a default against the other defendants, and offered to introduce evidence to establish the amendment, which had

been stricken from the files. The court refused these requests, and dismissed the action as to all the defendants but T. J. Harwick.

It is to be observed that the amendment to the petition was not substituted for the original petition. It purports to be an amendment making new parties and additional statements. It is very plain, therefore, that the petition as amended contained two causes of action; one an action at law against T. J. Harwick upon a promissory note, and the other a petition in equity against May Harwick and the other defendants, the object of which was to establish and enforce a mechanic's lien. It is expressly provided by statute that the action upon a mechanic's lien shall be by equitable proceedings, and no other cause of action shall be joined therewith. Code, § 2510. It is unnecessary to determine whether the plaintiffs could in one action enforce the mechanic's lien and also take a judgment against one of the parties for the amount that the promissory note exceeds the lien. The fact remains that the petition as amended contained two distinct causes of action. The plaintiffs should have elected on which cause of action they would proceed, or, after the motion to strike the amendment was sustained, they should have filed separate petitions, as provided by section 2634 of the Code.

The ruling of the court in refusing to entertain the action as to the new parties defendant was correct. It is true, they did not join in the motion to strike the amended petition. But when it was stricken from the files, it could neither be transferred to the equity calendar, nor made the basis of any other action by the court.

AFFIRMED.

BUTLER V. BARKLEY ET AL.

THE SAME V. LEWIS.

67	491
79	843
87	491
84	733
87	491
115	680

1. **Appeal: RIGHTS OF PARTIES NOT JOINING IN.** Parties to an action not joining in an appeal can present no questions affecting their claims or interests not involved in the questions raised by the appellant.
2. **Quitclaim Deed: PURCHASER CHARGED WITH NOTICE OF EQUITIES.** A purchaser of land by a mere quitclaim deed is charged with notice of all equities existing adverse to the title he derives under the deed.
3. **Principal and Agent: PRINCIPAL AFFECTED BY AGENTS' FRAUD.** A party can have no benefit from fraud practiced by his agent on his behalf.
4. **Vendor and Vendee: TITLE BURDENED BY DECREE AGAINST VENDOR.** One who takes a deed to land, after a decree has been entered against his grantor affecting the title, takes it subject to the terms of the decree.

Appeal from Polk Circuit Court

THURSDAY, DECEMBER 10.

THESE two actions were consolidated and tried in the court below as one action. They are each in chancery, and together involve the title of certain real estate. There was a decree in the court below in favor of the defendants, or some of them, which set aside and declared void for fraud a deed upon which plaintiff bases his right to the land. He now appeals to this court. The facts of the case, so far as it is necessary to state them in order to understand the points in issue and decided upon this appeal, appear in the opinion of the court.

Wright, Cummins & Wright and *W. S. Sickmon*, for appellant.

Phillips & Day, Shaw & Kuehls and *Berryhill & Henry*, for appellees.

BROCK, CH. J.—I. The facts of this case are not without intricacy, and many of them become unimportant in view of the issues involved as presented by this appeal. After reaching a conclusion as to the questions for determination, the case assumes simplicity in its facts and in the principles of law involved. In order to understand the true questions involved in the case, its history and, to some extent, the pleadings must be briefly stated.

II. Plaintiff brought an action against Barkley, claiming that a certain deed for the property in controversy, executed to him by Daniel Denison, was for the use and benefit of plaintiff, and obtained with his money, and praying that Barkley be required to convey the land to him. These parties contested over this claim of plaintiff, but finally, in the progress of the suit, they seemed to have come to terms, and Barkley conveyed the property to plaintiff after the decree was rendered. This eliminated the disputes of these parties from the case. But Denison intervened in the action, alleging that the deed was obtained from him through fraud practiced by Barkley, and asked that it be set aside. The defendant Lewis holds a tax title upon the land, and plaintiff brought the second action against him to redeem. Barkley intervened, setting up his claim, as did Denison. It is set out in the pleadings that Daniel Denison held the land under a deed from Jessie W. Denison, which was executed to secure money to be paid by him, and was therefore a mortgage in effect. Various questions are presented as to the right of the parties arising upon this state of facts. The circuit court found (and so decreed) that the deed to Barkley, under which plaintiff claims title, was obtained through fraud, and is therefore void; that the title of the land is vested in Lewis, subject to the payment by him of the amount due upon the equitable mortgage above referred to. Plaintiff alone appeals. The other parties, not joining in the appeal, can now present no questions affecting their claims or interest not involved in the questions arising upon plaintiff's appeal.

Having failed to appeal, they can have no modification of the decree. *Smith v. Wolf*, 55 Iowa, 555; *Hintrager v. Hennessy*, 46 Id., 600.

III. It will be readily observed that all questions are eliminated from the case except those involving the validity of the deed to Barkley executed by Denison. That deed is a quit-claim, and plaintiff claims under it. He is charged, under familiar rules of the law, with notice of all equities existing adverse to the title he derives under the deed; and, besides this, he claims that Barkley purchased the land for him as his agent or trustee. If there was fraud in his agent's acts in his behalf, he can have no benefit therefrom. Barkley's deed, which withdraws him from the case, was executed to plaintiff after the decree in this case was rendered by the court below. Of course, plaintiff can set up no claim that under this deed he holds rights to the property as an innocent grantee.

IV. The only question in the case is one of fact involving the inquiry whether the deed to Barkley was procured by fraud. We think the conclusion of the circuit court, to the effect that it was, is amply supported by the testimony. It is not our custom to discuss questions of fact of this character. Such discussion in this case would not prove beneficial to the profession, as it would involve the consideration and decision of no doubtful or uncertain principle of law. Nor will it prove beneficial to the parties, and we presume would not be desired by some of them. We therefore content ourselves with announcing the conclusion that in our opinion the decree of the circuit court ought to be

AFFIRMED.

DAVIS v. THE IOWA STATE INS. CO.

1. **Fire Insurance: INTEREST OF ASSURED AS DETERMINED FROM CONSTRUCTION OF DEED: POLICY FORFEITED BY FAILURE TO DISCLOSE TRUE INTEREST.** The policy sued on provided that if the interest of the assured in the property was not absolute, it must be so stated in the policy, or it would be void. The deed under which the assured held contained the following clause as a part of the description of the property and estate conveyed: "The intention being to convey to (the grantee) a life estate in said real estate, and at her death to then vest the title in her children." *Held* that the assured had only a life estate, and that, as the fact of her limited estate was not stated in the policy, it was void by its own terms, and no recovery could be had thereon.

Appeal from Clinton District Court.

FRIDAY, DECEMBER 11.

ACTION upon a policy of insurance. The cause was tried to the court without a jury, and judgment was rendered for plaintiff. Defendant appeals.

Craig, Collier & Craig and *E. S. Bailey*, for appellant.

George B. Young and *A. Howat*, for appellee.

BECK, CH. J.—I. The policy contained a clause providing that certain conditions printed upon the back of it constituted a part thereof. One of these conditions is in the following language: "If the interest of the property to be insured be a leasehold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void." The policy also referred to the application of the assured as forming a part thereof. In this application she stated that no person, other than herself, was interested in the property.

The plaintiff's title is based upon a deed of which the following are the material points: "This deed of bargain and sale, made and executed the twenty-first day of November,

A. D. 1881, by and between Raphael Rinehammer and Julia A. Rinehammer, his wife, of the county of Clinton and state of Iowa, parties of the first part, and Hattie A. Davis, of the same place, as party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of eight thousand dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted and sold, and do by these presents grant, bargain, sell, convey and confirm unto the said party the real estate situated in the county of Clinton and state of Iowa, and known and described as follows, to-wit, [here follows description of property;] the intention being to convey to Hattie A. Davis a life-estate in said real estate, and at her death to then vest the title in her children,—that is to say, the children of her body,—and if there should none survive her, then the said real estate shall revert to the said R. Rinehammer, or to whomsoever he may convey, or direct the same to be conveyed, to have and to hold the afore-granted premises, with all the appurtenances thereto belonging unto the said second party. The said R. Rinehammer hereby covenanting for himself, his heirs, executors and administrators that the afore-granted premises are free from any incumbrance, except a mortgage to the Perpetual Building Association, of Clinton, Iowa, which said grantee assumes and agrees to pay; that he has full right, power and authority to sell the same, and he will warrant and defend the title unto the second party against the claim of all persons whomsoever lawfully claiming the same; and the said Julia A. Rinehammer hereby releases and relinquishes all her share of, and right of dower in and to, the above granted and described premises.”

II. It becomes a material question for our determination whether plaintiff held an “absolute interest” in the property insured. By the term “absolute interest” we understand a complete and perfect interest, not an estate for years or for

life. An estate in fee-simple is meant. Counsel for the respective parties seem to concur in this view.

But plaintiff's counsel insist that the deed to plaintiff does not convey such a title; the clause thereof declaring the intention of the grantor being not of the *habendum* part of the deed, nor of the description of the estate conveyed. But it is in fact found in what is called the "premises" of the deed, which contains a description of the property conveyed and the estate granted. The clause of the deed describing the estate granted in unmistakable language declares that the intention of the grantor was to convey a life-estate. That clause is, in fact, a description of the interest granted, and limits it to an estate for life. The deed is not a conveyance of an estate in fee-simple, with a limitation inconsistent with the grant, as is the case with the deed in *Case v. Dwire*, 60 Iowa, 442. It is a conveyance of a life-estate, and nothing more. We are unable to see how the description of the interest conveyed could be more plainly expressed than is done in this deed. We discover nothing in the cases cited by plaintiff's counsel in conflict with this conclusion. *Green Bay, etc., Co. v. Hewett*, 55 Wis., 96; S. C., 12 N. W. Rep., 382, is relied upon by plaintiff's counsel to support his conclusions. In that case there was a conflicting description of the property conveyed, not of the estate granted. The deed, being a quitclaim, purports to convey all the grantor's interest in certain land. Another subsequent clause further declares that the interest intended to be conveyed was the same the grantor had acquired under a sheriff's deed. He held an undivided half of the land under that deed, and the other half from a different source. We need not determine whether the decision of the case is in accord with principles of the law. It is distinguished from this case by its facts.

III. The plaintiff holding not the absolute interest,—the fee-simple title,—but a life estate, the condition of the policy, declaring that if her interest was not disclosed the policy shall be void, is broken, and by the terms of the policy no

 Montgomery v. Sutton.

recovery can be had. No waiver of this breach is claimed.

IV. Much is said in argument upon the question whether the declaration of plaintiff in her application as to her interest in the property operates as a warranty. We need not pursue this subject, as we find a breach of an express condition of the policy which defeats recovery. In our opinion, the district court erred in holding that plaintiff was entitled to recover upon the undisputed facts of the case relating to the estate of plaintiff and the condition of the policy.

REVERSED.

67	497
80	590
67	497
135	499

MONTGOMERY V. SUTTON.

1. **Arrest: RESISTANCE TO OFFICER MAKING: FACTS NOT JUSTIFYING.**

A person who resists an officer in making an arrest cannot justify his resistance on the ground that the party arrested is not guilty of the charge upon which he is arrested.

2. —: **WITHOUT WARRANT: WHEN LAWFUL: ERRONEOUS INSTRUCTION.** Under § 4200 of the Code, a peace officer may make an arrest without a warrant when a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it; and an instruction given herein, limiting the right to make such arrest to cases where an offense is committed or threatened in the officer's presence at the time of the arrest, or afterwards only in case the offender is likely to escape, *held* erroneous.

Appeal from Story District Court.

FRIDAY, DECEMBER 11.

THE petition in this case sets forth two causes of action, one for false imprisonment, the other for malicious prosecution. In addition to general denials of the averments of the petition, the answer avers that defendant was the marshal of the city of Boone, and acted as such in making the arrest, and in instituting the proceedings of which plaintiff complains

Montgomery v. Sutton.

The answer also pleads justification of the acts of the defendant. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for \$600 for the imprisonment, and \$187 for the alleged malicious prosecution. Defendant appeals.

Hull & Whittaker, F. D. Thompson and Geo. G. Wright,
for appellant.

Holmes & Goode, for appellee.

ROTHROCK, J.—This cause has once before been in this court. See 58 Iowa, 697. The leading features of the case are there stated, and, although the facts in the last trial are not identical with those in the first, there is no such variance as renders it necessary to do more than refer to the former opinion. That the defendant was marshal of the city of Boone, and arrested and imprisoned plaintiff, and afterwards filed an information against him, and prosecuted him for an alleged offense, are conceded facts. The questions in the case are: Were the arrest and imprisonment without authority of law? and, was the prosecution malicious and without probable cause?

The defendant claims that the plaintiff was rightfully arrested, because, while defendant was attempting to arrest one Hart upon the streets of the city for the violation of an ordinance of the city, the plaintiff willfully and knowingly resisted and opposed the arrest, and that thereupon the defendant arrested the plaintiff for such resistance. We held upon the former appeal, following *State v. Bates*, 23 Iowa, 96, that a party who resists an officer in making an arrest of another cannot justify his resistance upon the ground that the party charged and arrested by the officer is not in fact guilty. The arrest of the plaintiff was made by the defendant without warrant. The court instructed the jury upon the cause of action for the arrest as follows:

1. ARREST :
resistance to
officer mak-
ing : facts not
justifying.

2. ——— : with-
out warrant :
when lawful :
erroneous
instruction.

(4) "To entitle the plaintiff to recover in this action on the first count of his petition, he must satisfy the jury, by a preponderance of evidence—*First*, that the defendant arrested and imprisoned him without warrant, and at a time when plaintiff was not committing, or threatening to commit, a crime or misdemeanor, nor likely to escape after having so committed a crime or misdemeanor, in said defendant's presence or view; and if you find from the evidence that defendant did so arrest and imprison the plaintiff, then you must find for the plaintiff on the first count of his petition for whatever amount in damages you find from the evidence he has sustained by reason of such false imprisonment, if any." We thought upon the oral argument that the giving of the above instruction would require the reversal of the case, and our subsequent consultation and examination of the record has confirmed us in that view. A great mass of testimony was introduced upon the trial upon the question whether or not the plaintiff resisted the defendant when he arrested Hall. It was one of the principal contested questions in the case. The thought of the instruction under consideration is that, if the plaintiff did resist the defendant in arresting Hall, the defendant would be liable if he afterwards arrested the plaintiff without a warrant, unless the plaintiff was likely to escape. Section 4200 of the Code provides that a peace officer may make an arrest without a warrant, "when a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." It is obvious that, in view of this provision of the statute, this instruction cannot be sustained.

In discussing this question in the printed argument of appellant, the instruction is designated as number *three*, when it should be number *four*. It is evidently a misprint, as the argument has no application to instruction number three, and no exception was taken to that instruction.

II. The court held that the ordinances of the city under which defendant claimed to have acted were inadmissible as

 Kent v. Coquillard.

evidence, because they were void, being a mere re-enactment of the statutes of the state. They were allowed to be introduced, however, as bearing upon the question of a want of malice in the defendant. We do not think it necessary to determine the question as to the validity of these ordinances. If the plaintiff was guilty of resisting an officer, he was liable to arrest under section 3960 of the Code, and the defendant was justified in arresting him without a warrant wherever he could find him.

REVERSED.

67 100
81 312

 KENT V. COQUILLARD.

1. **Practice in Supreme Court: AMENDED ABSTRACT.** Where appellee files an amended abstract, it will be taken as true, unless denied by appellant.
2. ———: **PRESUMPTION IN FAVOR OF TRIAL COURT.** Where the record as presented to this court shows that the trial court found that appellant was duly and legally served with process, it must be presumed, in the absence of a showing to the contrary, that such finding was based on sufficient evidence.

Appeal from Plymouth Circuit Court.

FRIDAY, DECEMBER 11.

A JUDGMENT by default having been rendered in a foreclosure proceeding against defendant and others, he made a motion to set aside the judgment and for permission to defend, which was overruled. From the order overruling the motion the defendant appeals.

Argo, Kelley & Augir and A. H. Lawrence, for appellant.

Rickel & Bull and Joy, Wright & Hudson, for appellee.

BECK, CH. J.—I. Service of notice of the action was made upon defendant by publication. The motion to set aside

the judgment and for permission to defend is based upon the ground that the affidavit required by the Code, § 2618, does not comply with that provision. The affidavit shows that personal service cannot be made within the state upon all the defendants, but fails to state specifically that such service cannot be made upon defendant. The record shows that prior to the rendition of the judgment another affidavit was filed, substantially complying with the requirements of the section of the Code above cited. The first affidavit was not entered in the appearance docket as required by the Code, § 200.

II. Counsel for defendant insist that the judgment was rendered without jurisdiction, for the reason that there was no service of the notice as required by the statute. This position is based upon the ground that there was no affidavit, as required by the statute, which would authorize the publication of notice, and for the further reason that, as the first affidavit was not entered in the appearance docket, it cannot be regarded as having been filed in the case.

III. The plaintiff files an amended abstract for the purpose of setting out fully the judgment against defendant. It recites that the court found that all the defendants, naming appellant among the others, were "duly and legally served with notice," etc. This abstract is not denied by defendant. The defendant's abstract does not show that it contains all the records and evidence submitted to the court upon the trial. In the absence of a showing in the record to the contrary, we are required to presume that there was before the court sufficient evidence to justify the finding that defendant had been "duly and legally" served with process. *Hale v. First Nat. Bank*, 50 Iowa, 642.

We reach the conclusion that the judgment of the circuit court overruling defendant's motion ought to be sustained.

AFFIRMED.

BURROWS V. FRANK ET AL.

1. **Pleading:** SUFFICIENCY OF PETITION TO WARRANT JUDGMENT: ALLEGATION OF AGENCY. Action to recover of defendants the benefits of a contract made by them, as agents of plaintiff, with a third party. Upon examination of the original and amended petitions, *held* that the allegations of agency were sufficient to sustain a finding and judgment for plaintiff.

Appeal from Adams Circuit Court.

FRIDAY, DECEMBER 11.

DEFENDANTS filed a motion in arrest of judgment and for a new trial, which was overruled, and they appeal.

C. D. Kasson and T. M. Stewart, for appellants.

Anderson & Towner, for appellee.

SEEVERS, J.—The original petition contains two counts. The first states that plaintiff applied to defendants to negotiate a loan for him, which they did, and exacted or received \$49.50 more interest than was due, and judgment is asked therefor. The second count states that a large part of the loan so obtained was payable to Mrs. Coleman, and that about the time the same became due the plaintiff applied to the defendants, "who were the agents of said Eliza R. Coleman, and through whom she collected the interest as the same accrued on said loan," for an extension thereof at a lower rate of interest; that, in truth and in fact, Mrs. Coleman granted such extension at a reduced rate of interest, but that defendants informed the plaintiff that no extension could be granted at a less rate of interest, and thereafter they paid the rate of interest provided in the contract; and the plaintiff seeks to recover the difference between the two rates. A motion was filed for a more specific statement, to which the plaintiff submitted in part, and filed what is called an "amended

petition." This petition contains two counts. The first is in substance the same as the first count in the original petition, except that it states that the defendants were acting as plaintiff's "agents in said loan negotiations and the payment of the interest." The material portions of the second count are as follows; "That about the time" the loan became due the plaintiff desired and requested "the defendants to procure an extension of time on said loan at eight per cent interest; that said defendants induced plaintiff to believe, and he did believe, that no extension of said loan could be obtained, but stated to plaintiff that foreclosure proceedings would not be commenced if he would continue to pay the ten per cent interest until the principal was demanded." It is then stated that the payee of the mortgage in fact agreed to accept eight per cent interest, but that the plaintiffs paid the defendants ten per cent, and for the difference between these two sums the plaintiff asked judgment. The answer of the defendant denied the allegations of the petition, and in relation to the transaction stated in the second count, stated that they were the agents of Mrs. Coleman. There was a trial to the court, and the court found "that the defendants were acting as the agents of plaintiff in negotiating the agreement" in relation to the extension of time and abatement of interest, and "that the benefit of that agreement accrued to the plaintiff." Judgment was rendered on the second count for the plaintiff. The defendants moved the court to arrest the judgment, and for a new trial, on the ground that no cause of action was stated in the second count, and that thereunder the plaintiff was entitled to no relief whatever. The motion was overruled.

I. The appellants maintain that the petitions must be regarded as one pleading, and construed accordingly. Code, § 2692; *Montgomery v. Schockey*, 37 Iowa, 107; *Cooley v. Brown*, 35 Iowa, 475; *Kostendader v. Pierce*, 37 Iowa, 645. This, for the purpose of the case, will be conceded. Counsel for the defendants contend that the averments in the second

count of the petition, and amendment thereto, show that, in obtaining an extension of time and abatement in the rate of interest on the loan, they were acting as the agents of Mrs. Coleman, and that it must necessarily follow that they were liable to her for all of the money they received from the plaintiff.

The petition and amended petition each contain two counts, and the plaintiff therein seeks to recover on two causes of action. Substantially, each count contains a statement of a cause of action upon which the plaintiff is entitled to recover, unless the objection under consideration is well taken. The two causes of action are differently stated in each count which has reference thereto. In the first count in the petition it is simply stated that the plaintiff applied to the defendants to procure the loan, but it does not state in terms whether the defendants acted as the agents of Mrs. Coleman or of the defendants. In the first count of the amended petition, it is stated that the defendants, in obtaining the loan, acted as the agents of the plaintiff. It seems to us that these two counts should and must be regarded as stating the same cause of action in a different manner.

Now, as to the second counts. In the original petition it is stated that the defendants were acting as the agents of Mrs. Coleman; but the second count in the amended petition does not contain this or any similar averments. On the contrary, we think the facts stated in such count show that the defendants were acting as the agents of the plaintiff. But, if wrong in this, we are sure the count in this respect must be regarded as sufficient after verdict. The evidence is not before us, and the finding of the court has the force and effect of a verdict. The second counts in the petition and amended petition are not inconsistent with each other, and they should be construed as each stating the same cause of action in a different manner; and under the second count of the amended petition the plaintiff was entitled to all the relief he obtained.

AFFIRMED.

Fleming v. The Town of Shenandoah.

FLEMING V. THE TOWN OF SHENANDOAH.

1. **Practice: ALLOWING REPORTER TO READ NOTES OF EVIDENCE TO JURY.** In this case, after the jury had retired for deliberation, the short-hand reporter, under order of the court, but in the absence of the court and counsel, and without the knowledge of appellant or its counsel, went into the jury room and read from his notes such portions of the evidence as the jury called for. *Held* that the proceeding was without warrant, and that on account of the irregularity a new trial should have been granted on defendant's motion.
2. **Husband and Wife: INJURY TO WIFE ON DEFECTIVE SIDEWALK: RECOVERY FOR LOSS OF TIME: RULE STATED AND APPLIED.** It would *seem* that a married woman cannot recover for loss of time occasioned by an injury, if her occupation is only that of a housewife in her husband's family. See *Lyle v. Gray*, 47 Iowa, 153. But where she has a separate and independent employment, which she habitually follows, and for which she receives compensation from her employers, she may recover for loss of time. In this case, where plaintiff was habitually engaged in washing clothes for others for a regular compensation, *held* that she was entitled to prove the value of the time she had lost by the injury complained of.
3. **Evidence: ERROR WITHOUT PREJUDICE.** The allowance of an improper question, though objected to, is no ground for reversal, when the answer given does not prejudice the appellant.
4. **Personal Injury: EVIDENCE: VISITS OF PHYSICIAN.** In a suit based upon personal injury, the number of times plaintiff's physician called on her to treat the injury was material as bearing on the question of the severity of the injury.

Appeal from Page District Court.

FRIDAY, DECEMBER 11.

THE plaintiff brought this action to recover damages for a personal injury, which she alleged she received by falling upon a defective sidewalk in the town of Shenandoah. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

James McCabe, for appellant.

Stockton & Keenan, for appellee.

67	405
90	593
67	505
108	26
108	543
108	550
67	505
128	285
67	505
e143	58
1143	132

Fleming v. The Town of Shenandoah.

ROTHROCK, J.—I. One of the grounds of the motion for a new trial was that William E. Butler, the official short-

1. PRACTICE: hand reporter of the court, was permitted to go allowing reporter to read into the jury room and, in the absence of court notes of evidence to jury. and counsel, and without the knowledge of the defendant or counsel, read from his notes taken at the trial such portions of the testimony as the jury called for. It is stated in the abstract that the following was appended to the motion for a new trial: "JOHN W. HARVEY, judge of said court, sworn, stated that, after the jury had been out some time, he received a communication from the foreman requesting that the short-hand reporter be sent in to read certain testimony, not stating what testimony they desired to hear. The judge sent the reporter into the room, without consulting either of the attorneys, to read the testimony that the jury desired. Don't remember that either counsel were present at the time. The reading by the reporter was not in presence of the court, but in the jury room, if there was any reading, and it is presumed there was. Wm. E. Butler, official reporter, in pursuance with Judge HARVEY's direction: I read to the jury in the jury room Wm. McMahon's testimony, both direct, cross-examination, redirect examination, and a portion of R. W. Morse's testimony."

Counsel for appellant insists that the motion for a new trial should have been sustained because of this irregularity in the course of the trial. We think the position is well taken. It is provided in section 2791 of the Code that when the jury retire for deliberation upon the case they shall be kept together under the charge of an officer until they agree, or are discharged by the court, and that the officer having the jury under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon a verdict, unless by order of the court. Section 2797 is as follows: Upon retiring for deliberation the jury may take with them all books of account, and all papers which have been received as evidence in the cause,

Fleming v. The Town of Shenandoah.

except depositions, which shall not be so taken unless all the testimony is in writing, and none of the same has been ordered to be struck out." The evident purpose in excluding the depositions is that they shall not be given more consideration by the jury than the oral testimony in the case. Reading to the jury a part of the testimony from the shorthand notes would have precisely the same effect. It cannot be claimed that there is any authority of law or practice, written or unwritten, which can justify an order to the shorthand reporter to go into the jury room and read testimony to the jury, unless by the consent of the parties. It never has been regarded as within the province of even the trial judge to have any communication with the jury upon the law or the facts of the case after they have retired for deliberation, unless by the consent of the parties, or unless they request further instructions, in which case they should be brought into court for that purpose.

II. The plaintiff in her petition claims damages for loss of time and expense of medical attendance caused by the injury of which she complains. The answer was a general denial. The plaintiff was a witness in her own behalf, and upon her cross-examination it was made to appear that she was a married woman, living with her husband at the time she received the injury and up to the time of the trial. It was shown by her testimony that she followed washing clothes for a livelihood, and that she received one dollar a day for her services; that she conducted her own business, and had regular places where she pursued her employment; and that when she was through work at a place the money was paid to her, and she used it in support of her family. The defendant's counsel moved to exclude all of the testimony as to the business in which the plaintiff was engaged, and the motion was overruled. It is insisted by counsel for appellee that the ruling was correct, because the defendant made no issue in its answer upon the question as to the right of the

2. HUSBAND
and wife:
injury to wife
on defective
sidewalk: re-
covery for
loss of time:
rule stated
and applied.

Fleming v. The Town of Shenandoah.

plaintiff to recover for lost time. We need not determine that question. We think that, under the evidence, the plaintiff was entitled to claim reimbursement for the time which she was prevented from following her usual avocation. It appears that she had a business or occupation independent of her husband, and that she pursued it as a means of earning a livelihood for herself and family. Under section 2211 of the Code she had the right to receive the wages of her personal labor, and maintain an action therefor. She cannot recover for loss of time occasioned by an injury if her occupation is that of mere housewife in the family of a husband. *Lyle v. Gray*, 47 Iowa, 153. But when she has a separate and independent employment, which she habitually follows, and for which she receives compensation from her employers, she may recover; and it makes no difference how humble or how exalted the employment may be. The test of her right to damage for loss of time is whether she was in the employment of persons other than her husband on her own account, or carrying on some business in her own behalf. *Mewhirter v. Hatten*, 42 Iowa, 288; *Tuttle v. Chicago, R. I. & P. R'y Co.*, Id., 518.

III. It is claimed that the court erred in permitting the plaintiff to testify as to the expense of the medical treatment made necessary by the injury. The ready answer to this is that the witness stated, in answer to the question objected to, that she did not know, as she had not settled with her physician. She was also permitted to state, over the defendant's objection, that her physician visited her seven times for the purpose of giving attention to her injuries. This evidence was competent as bearing upon the question as to the severity of the injury, if for no other reason.

IV. A great many other errors are assigned and argued. We have given them such consideration as they seem to demand. None of them are well taken, and it would be a useless waste of time to discuss them at length. The case

3. EVIDENCE:
error without
prejudice.

4. PERSONAL
injury : evi-
dence : visits
of physician.

Wilson v. The Des Moines, Osceola & Southern R'y Co.

was in the main fairly tried, and but for the error in permitting the short-hand reporter to enter the jury room and read from his notes to the jury, we would promptly affirm the judgment. For that error it must be

REVERSED.

WILSON V. THE DES MOINES, OSCEOLA & SOUTHERN R'Y CO.

87	509
91	537
87	500
118	494

1. **Railroads: OCCUPATION OF ALLEY: DIMINUTION OF RENTAL VALUE OF PROPERTY: EVIDENCE.** Where the question related to the diminution of the rental value of town property by reason of the construction and operation of a railway over and along an adjacent alley, *held* that it was proper to show how the occupants of the property were annoyed by the noise, escape of fire from engines, etc., by the operation of the road.
2. ———: ———: **ACTION BY ABUTTING LOT OWNER: SUBSEQUENT ASSESSMENT OF DAMAGES ON COMPANY'S MOTION NO BAR TO ACTION: EVIDENCE.** Defendant built its road along an alley adjacent to plaintiff's town property, without first compensating plaintiff for his damages, as required by § 464 of the Code. Plaintiff brought this action to recover his damages. Defendant pleaded, as in bar of the further prosecution of the action, that subsequent to the beginning of the action it caused plaintiff's damages to be ascertained, in the manner provided by law, and that such assessment was made as of the time when the road was constructed in the alley, and interest was computed thereon up to the date of assessment, and that plaintiff had appealed from the award. Evidence offered in support of this defense was excluded upon plaintiff's objection. *Held* that it was rightly excluded, because there was no warrant in law for the assessment of plaintiff's damages prior to the date of the assessment, and that the plea was no defense to the action as to such damages.

Appeal from Clarke Circuit Court.

FRIDAY, DECEMBER 11.

THE plaintiff is the owner of two lots in the town of Osceola, upon which his dwelling-house and out-buildings are situated. There is a street in front of his lots, and an alley in the rear, which is about twenty feet wide. The defend-

 Wilson v. The Des Moines, Osceola & Southern R'y Co.

ant constructed its railroad along the alley, and laid down two railroad tracks therein, so that the plaintiff was prevented from having access to his barn by way of the alley. This action was brought to recover damages for so obstructing the alley. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

McIntire Bros., for appellant.

W. B. Tallman, for appellee.

ROTHROCK, J.—I. The plaintiff, in his petition and amended petition, set out at great length the manner in which his property was injured and he was damaged. In response to a motion filed by the defendant, the court struck out all claims for damages, excepting the diminution of the rental value of the plaintiff's property from the time the alley was obstructed by the defendant up to the commencement of the suit. The plaintiff excepted to this ruling, but did not stand upon his exception. The cause was tried to the jury, in accord with the ruling of the court, and the charge to the jury directed that the measure of damages was the difference in the rental value occasioned by appropriating the alley of the defendant, from the time of such appropriation to the commencement of the suit. The plaintiff made no objection to the instruction, and does not appeal. It will thus be seen that the ruling of the court narrowed the plaintiff's claim down to a single injury.

In the introduction of the evidence the court permitted the plaintiff to show how the occupants of the property were annoyed by the noise, escape of fire from engines, etc., by the operation of the road. The defendant objected to this evidence. The court admitted the evidence, upon the ground that all the facts attending the use and operation of the railroad were proper to be given in evidence as bearing upon the

1. RAILROADS:
occupation of
alley; diminution of rental
value of property; evidence.

Wilson v. The Des Moines, Osceola & Southern R'y Co.

rental value of the property. We think the ruling of the court was correct. The jury were required to determine the rental value, and it was manifestly proper to put them in possession of all the facts attendant upon the occupation of the alley by a railroad.

II. The railroad was constructed in the alley about the month of March, 1882. This action was commenced on the

2 —: —: first day of February, 1883. It is alleged in the
 action by
 abutting lot
 owner: sub-
 sequent
 assessment of
 damages on
 company's
 motion no bar
 to action: evi-
 dence.

answer that, before laying down the track in the alley, the town council of Osceola granted to the defendant the right to do so, and this fact is not disputed. The defendant further averred that on February 21, 1883, the defendant caused a sher-

iff's jury to be impaneled, to assess the damages to the plaintiff by reason of the construction of the road, and that said jury did in due and legal form assess said damages, and that such assessment was made as of the time when the railroad was constructed in the alley, and interest computed thereon up to the date of assessment. It was claimed in the answer and upon the trial that the assessment so made was a bar to the further prosecution of this case for damages. The court below did not so regard it; and when the defendant sought to introduce the assessment in evidence, an objection to the same by the plaintiff was sustained. The defendant also offered to show that the plaintiff had appealed from the award of the sheriff's jury to the circuit court, and this evidence was excluded. Complaint is made by the defendant because the court did not, in its charge to the jury, state all the issues, in that the answer in bar, founded upon the award, was not in any manner called to the attention of the jury. The court evidently was of the opinion that the award was no defense to this action. If this was a correct view of the case, the ruling made in excluding the evidence of the award took that question away from the jury, and any reference to it in the instructions, other than a statement that it was not to be considered, would have been improper. The defendant con-

Wilson v. The Des Moines, Osceola & Southern R'y Co.

tends that the assessment made by the sheriff's jury was a bar to the action, and that the circuit court erred in not so holding. This is the material question in the case.

It is not claimed by the defendant that the plaintiff did not have a right of action when the suit was commenced. The claim is that when the right of way was condemned, and interest allowed on the damages from the date of laying down the railroad tracks in the alley, the plaintiff's right to prosecute the action should cease from that time. Appellant relies upon *Conger v. Burlington & S. W. R'y Co.*, 41 Iowa, 419. That case does not determine the question now under consideration. A very cursory reading of the opinion demonstrates the statement we make. The difference between the cases is so obvious that we cannot be expected to take the time and space to point it out. Further reliance is had on the case of *Daniels v. Chicago, I. & N. R. Co.*, 41 Iowa, 52. In that case the railroad company entered upon plaintiff's lot, and used it for railroad purposes, without instituting condemnation proceedings. The plaintiff brought an action of ejectment, and recovered judgment. *Daniels v. Chicago, & N. W. R'y Co.*, 35 Iowa, 129. Thereupon the defendant caused the plaintiff's damages to be assessed under the statute. It was held that the measure of compensation to which plaintiff was entitled was the damages he suffered at the date of the occupation of the lot by the railroad company, with interest. Under the statute applicable to that case, it was held that there was no provision of law prohibiting the corporation from entering upon the land prior to the assessment, or requiring the assessment to be had before the land was occupied; that either party was authorized to institute proceedings for the assessment of the land-owner's damages; that the land-owner in that case could have instituted the statutory proceedings at any time; and that the railroad company held the land at the sufferance of the owner.

The rights of the parties in the case at bar are quite different. Section 464 of the Code provides that no railroad track

Wilson v. The Des Moines, Osceola & Southern R'y. Co.

can be laid down in any street "until after the injury to property abutting on the street * * * upon which such railway track is proposed to be laid down has been ascertained and compensated in the manner provided for taking private property for works of internal improvement, as provided in chapter 4, title 10, of the Code." In the case of *Mulholland v. Des Moines, A. & W. R. Co.*, 60 Iowa, 740, it was held that, under this provision of the statute, the land-owner is not authorized to cause a sheriff's jury to assess the damages, and that the corporation is alone authorized to institute such proceedings, and that such proceedings should be had before property is entered upon or appropriated. It will thus be seen that there is no authority for an assessment of damages now for then, or running back to the time when the railway was located and constructed in the street or alley. This act was done by the defendant in direct violation of a plain provision of the statute, and for which it is liable in damages. And it appears to us that it is the plaintiff's right to recover such damages as he sustained up to the commencement of his suit, or until a new appropriation of the land was made by the assessment of the damages and condemning the right to use the alley for railroad purposes. As the plaintiff had no right to institute the proceedings, and the defendant is required to do so before locating its line and laying down its tracks, it seems to us that it is fair and equitable to require the defendant to pay the proper damages down to the time that it commences anew to appropriate the right which, under the statute, may be regarded as a new entry upon the street and appropriation of the right. We think the ruling of the court below was correct.

III. There are other questions made by counsel for appellant. They do not appear to us to be well taken; and, if they were such as to demand serious consideration, we would be precluded from examining them, because the assignments of error are not sufficiently specific.

AFFIRMED.

CUNNINGHAM v. THE CHICAGO, BURLINGTON & QUINCY
RAILWAY CO.

1. **Appeal to Supreme Court: LESS THAN \$100: QUESTIONS NOT CONSIDERED.** On the the appeal of a case involving less than \$100, this court will not review a *part* of an instruction given on the trial, nor will it pass on a question certified, when it contains assumptions of fact in conflict with the record. It is only questions actually arising in the case which can be considered on such appeals. See opinion for illustrations.

Appeal from Clarke Circuit Court.

FRIDAY, DECEMBER 11.

ACTION to recover under the statute double the value of a cow killed by a train upon defendant's road. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Stuart Bros., for appellant.

James Rice and *W. B. Tallman*, for appellee.

BECK, CH. J.—I. The amount in controversy being less than \$100, the case is brought here for decision upon questions certified by the judge of the circuit court. These questions involve the correctness of an instruction which is set out in the certificate in the following language: "It would be negligence to run a train at a high rate of speed in view of the crossing of a public highway that was known to be frequented by stock, when such high rate of speed would involve additional peril to both train and stock." Upon inspection of the record, we find the instruction in question in the following language: "It would be negligence to run a train at a high rate of speed, when done in view of a known danger, when such high rate of speed would increase the danger or hazard, or in view of the crossing of a public highway that was known to be frequented by stock, when such high rate

Cunningham v. The Chicago, Burlington & Quincy R'y Co.

of speed would involve additional peril to both train and stock."

The following questions are certified for our decision: "Would such instructions tend to mislead the jury as to the law? Is it necessarily negligence in a railroad company to run its trains at a high or rapid rate of speed when approaching the crossing of a public highway which is known to be frequented by stock, although it is not at the time known that there is any stock on or near such crossing, when such high rate of speed would involve additional peril to both train and stock?" The instruction referred to in the first question is in the form first quoted above.

II. It will be observed that the first question demands our opinion upon an instruction differing in form from the one given. The whole of an instruction must be considered in determining its correctness, and not selected parts of it.

III. The second question assumes that no stock was on or near the crossing where the accident happened. This is in conflict with the record, which contains evidence tending to show that cattle were near the crossing; some had just crossed the railroad track, and others were approaching it at the time. This fact presents an entirely different question from the one certified. We cannot, in a case of this character, answer questions which are not presented in the record. As neither of the questions certified is in the case, we cannot pass upon them. The decision of the circuit court is

AFFIRMED.

BOYLE V. MALLET.

1. **Trial de novo in Supreme Court: EVIDENCE WANTING.** A trial *de novo* cannot be had where it is not shown by the abstract that the evidence was ever certified by the trial judge, and it is in no way made to appear that all the evidence is contained in the abstract.

Appeal from Decatur Circuit Court.

FRIDAY, DECEMBER 11.

PLAINTIFF brought this action in equity, to quiet in him the title to certain real estate. Defendant answers, denying plaintiff's claim, and in a cross-petition he asked that the conveyance under which plaintiff claimed to own the premises be canceled and set aside, and that his title to the property be quieted. The cause was sent to a referee, who heard the evidence, and reported that the equities of the case were with plaintiff. The circuit court approved the report, and entered judgment granting to plaintiff the relief demanded in his petition. Defendant appeals.

S. H. Amos and Young & Parrish, for appellant.

S. A. Gates and Warren S. Dungan, for appellee.

REED, J.—Counsel for appellant have argued certain questions of fact, which they claim arise under the evidence. We cannot consider these questions. It is not shown by the abstract that the evidence offered or introduced on the trial was ever certified by the judge of the circuit court, as is required by the statute; nor is it in any manner made to appear that all of the evidence is contained in the abstract. The cause cannot, therefore, be tried *de novo* in this court; and, as there is no assignment of errors, we cannot treat it as an ordinary action. The judgment must therefore be

AFFIRMED.

The State v. Ball et al.

THE STATE V. BALL.

THE SAME V. EVANS.

THE SAME V. DECOTO ET AL.

THE SAME V. DECOTO.

1. **Appeal:** INSUFFICIENT RECORD: JUDGMENT AFFIRMED. A reversal cannot be had for alleged error in refusing a change of venue in a criminal case, when the record fails to show the grounds on which the change was asked.

Appeal from Harrison District Court.

FRIDAY, DECEMBER 11.

No appearance for appellants.

A. J. Baker, Attorney-general, for the State.

SEEVERS, J.—These causes have been submitted upon written transcripts. The first three contain the indictment, to which the defendants pleaded guilty, upon which the court rendered judgment in each case. The last case is like the others, except that the transcript does not contain a copy of the indictment. Motions were made in each case for a change of venue, which were overruled. The grounds upon which the motions were based are not stated in the transcripts. It is obvious that we can do nothing but affirm the judgments of the district court.

AFFIRMED.

FENDRICK V. FENDRICK ET AL.

1. **Gift: EVIDENCE NOT ESTABLISHING.** The evidence in this case (not set out in opinion) held insufficient to establish the gift of a farm by plaintiff to defendant.

Appeal from Carroll Circuit Court.

FRIDAY, DECEMBER 11.

THIS is an action in equity to recover the purchase money of certain real estate alleged to have been conveyed by the plaintiff to the defendant, and to establish and enforce a vendor's lien upon the same. There was a decree in the court below for the plaintiff. Defendants appeal.

J. M. Drees and *M. W. Beach*, for appellants.

Bowen & Cloud, for appellee.

ROTHROCK, J.—The land was conveyed by the plaintiff to the defendant Anton Fendrick on the twentieth day of February, 1882. The deed of conveyance expressed a consideration of \$2,500. There was a mortgage on the land for \$1,500, which, by the terms of the deed, Anton Fendrick agreed to pay. The balance of \$1,000 is the subject of this controversy. The defendants do not claim that this sum has been paid, but their contention is that the farm was a gift or present from plaintiff to the defendant. The case turns upon this question of fact. A careful examination of the evidence has led us to the conclusion that the decree of the court below is correct. As the case involves no other question, further elaboration is unnecessary.

AFFIRMED.

POLLOCK ET AL. V. SIMPSON ET AL.

1. **Judgment:** ON NOTICE BY PUBLICATION: MOTION FOR RETRIAL: NOTICE TO PLAINTIFF. Where a judgment has been rendered upon notice by publication only, the theory of the statute (Code, § 2877) is that the case remains virtually in court for two years for the purpose of a motion for a retrial, if any defendant shall see fit to make it; and the court has jurisdiction during such time to hear and pass upon such motion without notice thereof to the plaintiff. But the court should in such case, in the exercise of a proper discretion, allow the plaintiff a reasonable opportunity to appear and prepare for trial.

Appeal from Kossuth District Court.

FRIDAY, DECEMBER 11.

ACTION in equity to cancel a deed purporting to be made to the defendant Simpson, but alleged to have been forged; and also to set aside two other deeds made by Simpson, one of them to the defendant Viele, and one to the defendant Wiles. The defendants were served by publication only. No appearance was made, and decree was taken against them by default. Afterwards, and within two years, they appeared, and moved for a retrial. The motion was at first sustained, but the order sustaining it was afterwards set aside and the motion dismissed. From the order dismissing the motion the defendants appeal.

J. W. Cory, for appellants.

No appearance for appellees.

ADAMS, J.—The plaintiffs were represented in the court below at the time the decree was rendered by Mr. J. F. Duncombe. He now appears in this court, but claims to do so merely as a friend of the court, and for the purpose of suggesting that, at the time defendants' motion for retrial was dismissed, the plaintiffs had not been brought in by notice,

and had not appeared, and that the court, being without jurisdiction of the plaintiffs, could not rule upon the motion, nor properly make any other order than an order of dismissal. The object of Mr. Duncombe in disclaiming an intention to appear for the plaintiffs is, of course, to avoid giving the court jurisdiction of the plaintiffs, the want of which, he suggests, justified the order of dismissal, and will justify the court in affirming the order. There is some controversy between the parties as to whether the plaintiffs were not in fact notified of the motion for a retrial. It seems that Mr. Duncombe was informed by letter of such motion. But he claims that he had ceased to be attorney for the plaintiffs in the case, and, besides, that the mode of service could not be held to be sufficient if his relation to the case as attorney for the plaintiffs had not ceased. The question as to whether there was notice in fact presents some difficulties, but we do not find it necessary to determine it, because we are of the opinion that no notice was necessary.

The statute under which the motion was made is section 2877 of the Code, and is in these words: "When a judgment has been rendered against a defendant or defendants served by publication only, and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court, and move to have the action retried; and, security for costs being given, they shall be admitted to make defense, and thereupon the action shall be retried as to such defendants as if there had been no judgment." The statute does not provide that notice of the motion shall be served upon the plaintiffs, and we see nothing in the nature of the case which would justify us in ingrafting such a provision upon the statute by judicial construction. Service by publication is but a poor substitute for actual service,—justifiable only by necessity; and we are not disposed to strain the statute in the least for the purpose of giving force and efficacy to such notice.

Gunsel v. McDonnell et al.

On the other hand, we should be disposed, if necessary, to take a liberal view of all the provisions enacted for the purpose of avoiding the hardships which otherwise might be sustained by defendants brought in by such notice. But we are very clear as to the meaning of the statute. It provided in express terms that any defendant so served, and not appearing, shall afterwards, within two years, be admitted to defend, upon filing the requisite motion and giving security for costs. For the purpose of a retrial the judgment theretofore rendered is to be treated as a nullity. The theory of the statute unquestionably is that the case remains virtually in court for two years for the purpose of a motion for a retrial, if any defendant shall see fit to make it. The plaintiff, being in court, does not need to be brought in. The court should, of course, exercise some proper discretion as to the time for which the case should be set for trial. A reasonable opportunity should be allowed the plaintiff to appear and prepare for trial, and an abuse of discretion in this respect would probably be a ground of reversal. But more than that we do not feel justified in saying. We think that the defendants' motion was improperly dismissed.

REVERSED.

GUNSEL V. McDONNELL ET AL.

1. **Instructions as to Pleadings: ERROR CURED BY OTHER INSTRUCTIONS.** A failure to instruct the jury that the allegations of the petition are denied by the answer is no ground for reversal where, by other instructions, the jury is told that plaintiff cannot recover unless he establishes the material allegations of his petition by a preponderance of the evidence.
2. ———: **MORE SPECIFIC THAN THE ISSUE, BUT WARRANTED BY EVIDENCE.** Where the petition alleged a special property in a buggy, without stating the nature and extent of such property, and defendants, instead of moving for a more specific statement, put the allegation in issue as made, and the evidence showed the nature and extent of

67	521
118	46
67	521
136	146
67	521
143	100

Gunsel v. McDonnell et al.

plaintiff's property, *held* that an instruction which recognized the nature and extent of his property, as shown by the *evidence*, was not erroneous as not being warranted by the *issues*.

3. **Chattel Mortgage: PROPERTY IN HANDS OF PLEDGEE: SEIZURE UNDER MORTGAGE: OBJECTION BY PLEDGEE: WAIVER.** The chattels in question were in the hands of plaintiff, an unsatisfied pledgee of the mortgagor, at the time the chattel mortgage was made and when the property was seized thereunder. When the property was so seized, plaintiff objected, and claimed to be its owner, but did not claim a lien upon it. *Held* that by failing to assert his lien he did not waive his right to recover for the conversion of the property. *Angell v. Johnson*, 51 Iowa, 625, distinguished.
4. **Verdict: EVIDENCE TO SUPPORT ON APPEAL.** There being some evidence to support the verdict, it will not be disturbed in this court.

Appeal from Clay District Court.

FRIDAY, DECEMBER 11.

PLAINTIFF brought this action to recover the value of a buggy and a pair of buggy shafts, which he alleges the defendants wrongfully and maliciously took from his possession and converted to their own use. He alleges that he had a special property in the buggy, and that he was entitled to the present possession of it, and that he was the absolute owner of the shafts. In one count of his petition he demands punitive damages on account of the malicious taking and conversion of said property by defendants. In one division of their answer the defendants deny all the allegations of the petition. In another division they allege that the defendant McDonnell is the sheriff of Palo Alto county, and that McNally is marshal of Emmetsburgh, in said county, and that there was placed in their hands, for foreclosure, a chattel mortgage given by one A. F. Mayne to John R. Lemmon, and that said mortgage covered the buggy in question; that said buggy was in plaintiff's barn, and they took peaceable possession of the same under said mortgage, and removed it from said barn, and that plaintiff made no objection at the time to their taking it, and asserted no claim to it, but that he afterwards asserted

that he had brought the buggy from Illinois, and attempted to take it out of their possession by force. There was a verdict and judgment for plaintiff, and defendants appeal.

T. W. Harrison, for appellants.

P. O. Cassidy, for appellee.

REED, J.—The evidence tended to prove that Mayne, the owner of the buggy in question, delivered it to plaintiff as a security for a debt he was owing him, and that this pledge of the property was made before the execution of the mortgage under which defendants took possession of it. It also shows that, at the time defendants took the buggy from plaintiff's possession, he objected to their taking it, and asserted that he had brought it from Illinois, but made no claim that he had a lien upon it.

I. In instructing the jury, the court did not expressly tell them that the allegations of the petition were denied by the answer. This omission is the ground of the first assignment of error argued by counsel. We are of the opinion that defendants were not prejudiced by the omission. The court told the jury that before plaintiff could recover under the issue on account of the taking by defendants of the buggy, he must prove—*First*, that Mayne, the owner of the buggy, was indebted to him; *second*, that said buggy was placed in his possession by Mayne as a pledge to secure the payment of the debt; and, *third*, that this was done before the execution by Mayne of the mortgage to Lemmon. He also told them that before plaintiff could recover for the shafts (which were shown to be his own property) he must prove that defendants took and converted them. He also told them that if plaintiff was entitled to recover on account of the taking of the buggy, the measure of his recovery therefor would be the amount of the indebtedness for the security of which it was pledged; and

1. INSTRUCTIONS AS TO pleadings : error cured by other instructions.

that, if he was entitled to recover on account of the conversion of the shafts, the measure of his recovery therefor would be the value of said shafts. By these instructions the burden of proving the material allegations of his petition was as certainly placed upon plaintiff as it could have been done by an express direction that they were all denied by the answer, and the question of punitive damages was eliminated from the case.

II. It is next insisted that the instruction that plaintiff might recover for the taking of the buggy on proof that Mayne was indebted to him, and that he placed the buggy in his possession as a pledge for the security of such debt before the execution of the mortgage to Lemmon, is not applicable to any issue in the case. The allegation in the petition, that plaintiff had a special property in the buggy, is certainly very general and indefinite. If defendants had moved for a more specific statement in the petition, plaintiff would doubtless have been required to state the extent of his property in said buggy, and how the same was derived. Defendants, however, did not move for such statement; but put in issue the general averment that plaintiff had a special property in it. Under the issue thus made, plaintiff was entitled to introduce evidence tending to establish whatever special right or property he held in said buggy. The evidence, as stated above, tended to prove that the property had been pledged to plaintiff as security for a debt. The instruction was applicable to the evidence, and, as the parties had chosen to go to trial upon an issue which did not clearly define the right which plaintiff was seeking to establish, the court very properly determined from the evidence introduced the character or nature of the right he was asserting, and instructed with reference to it.

III. The court did not instruct the jury as to the effect of the failure by plaintiff to notify defendants, when they took possession of the property, that he claimed to have a lien upon it. Defendants insist that by neglecting at that

2. —: more
specific than
issue, but
warranted by
evidence.

Gunsel v. McDonnell et al,

3. CHATTEL
mortgage :
property in
hands of
pledgee: seiz-
ure under
mortgage: ob-
jection by
pledgee :
waiver.

time to assert his right to the property he waived such right, and that the court erred in not instructing the jury that such was the legal effect of his failure to assert it. It may be that if plaintiff had permitted defendants to take possession of the property without asserting any claim to it, or if he had made a false claim with reference to his right, and thereby induced them to take it, he would be estopped from afterwards asserting the claim he is now seeking to establish. But he did not permit them to take it without objection. He resisted them to some extent, and, in effect, asserted that he was the owner of the property; and they cannot claim that they were misled by anything he did at the time of the transaction. There is no element of estoppel in the case, and we think plaintiff did not waive his lien upon the property by failing at that time to assert it. The case is different in principle from *Angell v. Johnson*, 51 Iowa, 625, cited and relied on by appellants. It was held in that case that the right to hold personal property exempt from execution is a mere personal right which is waived, if not asserted at the time the property is seized on execution. But the right which plaintiff is seeking to enforce in the action is an interest in the property itself, and a right of that character would not be waived by the failure to assert it at the time of the seizure, unless the party making the seizure was thereby misled, or induced to change his relation with reference to the property. There was no conflict in the evidence with reference to what occurred between the parties when defendants seized the property, and we think the court correctly held that plaintiff did not waive his lien upon it.

IV. It is insisted that the verdict is not sustained by the evidence; but we think otherwise. There was evidence from which the jury might fairly have found as they did; and, under the well-settled rule prevailing here, we cannot interfere with their finding.

4. VERDICT:
evidence to
support on
appeal.

AFFIRMED.

67	526
79	543
87	536
99	507
101	143
87	526
102	206
103	520
87	526
109	556
87	526
121	506
121	506

THE GARDEN GROVE BANK V. THE HUMESTON & SHENANDOAH R'Y CO.

- 1. Carriers of Goods: BILL OF LADING: PAROL TO VARY TERMS OF: RIGHT OF BANK ADVANCING MONEY ON TO RELY ON WRITTEN AND PRINTED TERMS.** A bill of lading is both a receipt and a contract, and in its character as a contract it is no more open to explanation or alteration by parol than other written contracts. And where a bill of lading made by the defendant to W. provided that the goods should be delivered to the "consignee or owner," but the space designed for the name of the consignee was left blank, and it further provided that the property would be delivered only upon the surrender of the bill of lading, and the bill was assigned to the plaintiff to secure advances made to the shipper, and the defendant, pursuant to an oral understanding with the shipper, of which plaintiff had no notice, consigned the goods to S., who received and disposed of them, so that, when plaintiff presented its bill of lading and demanded the goods, delivery thereof was impossible, *held* that plaintiff had a right to rely upon the terms of the bill of lading, and that, in an action to recover of defendant the amount of its loss, evidence of the oral understanding upon which the goods were shipped to S. was not admissible.
- 2. Bill of Lading: CHARACTER OF CONTRACT: EFFECT OF ASSIGNMENT OF.** While a bill of lading is not negotiable, it is assignable, and possesses attributes not common to the ordinary non-negotiable instruments enumerated in § 2084 of the Code. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can be altered or changed only upon a surrender of the original, and a collateral oral understanding between the shipper and carrier, by which the property is to be delivered to one not the assignee and holder of the bill, does not follow it into the hands of an assignee without notice, and cannot defeat his rights under the terms of the bill.

Appeal from Lucas District Court.

FRIDAY, DECEMBER 11.

THE plaintiff seeks to recover of the defendant the sum of \$550 which it advanced upon a bill of lading issued by the defendant upon the shipment of certain walnut lumber, and which bill of lading was assigned to the plaintiff. The right of action is based upon the claim that the defendant failed

The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

to comply with its contract of shipment, and by negligence delivered the lumber to parties not authorized to receive the same, by which plaintiff was damaged in the amount advanced, and interest. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

T. M. Stuart, for appellant.

W. W. Morsman, for appellee.

ROTHROCK, J.—The facts necessary to a determination of the questions of law involved in the case are not disputed.

They are as follows: One Henry Zohn was engaged in buying walnut logs and walnut lumber along the line of the railroad of the defendant, and shipping the same to Chicago. About the twentieth day of August, 1881, he caused three cars to be loaded with said lumber, for shipment, at Van Wert, a station on the defendant's railroad.

Zohn was indebted to Wells Bros. in the sum of \$550 for this lumber, and on the twenty-third day of August, 1881, before any bill of lading was issued for the shipment of the property, Wells Bros. caused the lumber on said cars to be attached to secure their claim against Zohn. On the same day Wells Bros. and Zohn met at said station, and agreed that the bill of lading should be issued to Wells Bros. as consignors, that they should hold it as security for their claim against Zohn, and that they would take such bill of lading to the Garden Grove Bank, and draw a sufficient amount of money thereon to pay the claim of Wells Bros. The conversation in regard to this arrangement was in the presence of the station agent of the defendant, and he knew, when he issued the bill of lading, that Zohn and Wells Bros. expected and intended to use the same at the Garden Grove Bank to draw or receive money thereon. The said agent thereupon issued and delivered to Wells Bros. a bill of lading, of which the following is a copy:

1. CARRIERS
of goods: bill
of lading:
parol to vary
terms of:
right of bank
advancing
money on
to rely on
written and
printed
terms.

The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

"HUMESTON & SHENANDOAH R. R. Co. BILL OF LADING.

"FREIGHT OFFICE, VAN WERT, August 23, 1881.

"Received from Wells Bros., in apparent good order, by the Humeston & Shenandoah R. R. Co. the following described packages (contents and value unknown) consigned as marked and numbered in the margin, upon the terms and conditions hereinafter contained, and which are hereby made a part of this agreement, also subject to the conditions and regulations of the published tariffs in use by said railroad company, to be transported over the line of this road to Chicago station, and there delivered in like good order to the consignee or owner, at said station, or to such company or carriers (if same are to be forwarded beyond said station) whose line may be considered a part of the route, to the place of destination of said goods or packages; it being distinctly understood and agreed that the responsibility of this company as a common carrier shall cease at the station where delivered or tendered to such person or carrier; but it guarantees that the rate of freight for the transportation of said packages shall not exceed rates as specified below, and charges advanced by this company, upon the following conditions [read the conditions.] The owner or consignee to pay freight or charges as per specified rates upon the goods as they arrive. Freight carried by the company must be removed from the station *during business hours* on the day of its arrival, or it will be stored at the owner's risk and expense; and, in the event of its destruction or damage from any cause while in the depots of the company, either in transit or at the terminal point, it is agreed that the company shall not be liable except as warehousemen. It is agreed, and is a part of the consideration of this agreement, that the company will not be responsible for the leakage of liquors or liquids of any kind; breakage of glass or queensware; the injury or breakage of castings, carriages, furniture, glass show-cases, hollowware, looking-glasses, machinery, musical instruments of any kind, packages of eggs, or picture frames; loss of weight of

The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

coffee, or grain in bags, or rice in tierces; or for any decay of perishable articles; nor for damage arising from effects of heat or cold; nor for loss of nuts in bags, lemons or oranges in boxes, unless covered with canvass; nor for loss or damage of hay, hemp, cotton, or any article the bulk of which renders it necessary to transport it in open cars, unless it can be shown that such loss or damage occurred through negligence or default of the agents of this company. Goods in bond subject to custom-house regulations and expenses. The company is not responsible for accidents or delays from unavoidable cause; the responsibility of this company, as carriers, to terminate on the delivery or tender of the freight as per this bill of lading to the company whose line may be considered a part of the route to the place of the destination of said goods or packages. In the event of loss of any property for which the carriers may be responsible under this bill of lading, the value or cost of the same at the point and time of shipment is to govern the settlement for the same, except the value of the article has been agreed upon with the shipper, or is determined by the classification upon which the rates are based. And in case of loss or damage of any of the goods named in this bill of lading for which the company may be liable, it is agreed and understood that this company may have the benefit of any insurance effected by or on account of the owner of said goods. This receipt to be presented without erasure or alteration.

Marks and Consignees.	Car No.	Description of Articles given by Consignee.	Weight, Subject to correction.
	560 A. & N....	Walnut lumber.....	22,000
	1006 K. S. J. & C. B.....	" "	22,000
	9450 S.....	" "	22,000

"* * * Freight to be paid upon the weight by the company's scales, but no single shipment to be rated at less than 100 lbs. Car-load freight subject to the current

The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

rules as to the minimum and maximum weights. Charges advanced, (if any.) *This bill of lading to be surrendered before property is delivered.*

“S. O. CAMPBELL, Freight Agent.”

The bill of lading was issued and delivered on the evening of the twenty-third day of August. On the next morning Wells Bros. and Zohn appeared at the Garden Grove Bank, and requested the cashier to advance them \$550 on said bill of lading. He consented to do so. Thereupon Wells Bros. assigned the bill of lading to Zohn, and he assigned the same to C. S. Stearns, cashier of the bank, and at the same time Zohn executed a draft of \$550 in favor of said cashier to one J. H. Wallace, of Chicago, and the bill of lading, and draft attached thereto, were delivered to the cashier, in consideration whereof he advanced and paid for said bank to Wells Bros. the sum of \$550.

It will be observed that there is no person named as consignee in the bill of lading. The space under the head of “Marks and Consignees” is left blank. The defendant introduced parol evidence by which it was shown that, when the bill of lading was issued, the name of the consignee was intentionally omitted, because Zohn had not then determined to whom he would ship the lumber. He did not intend to return to Van Wert, and he directed the station agent to ship to Stokes & Son, of Chicago, unless he received other instructions from him by telegraph. No such instructions were received, and, on the next day, being the same day the plaintiff advanced the money on the bill of lading, the agent of the railroad company shipped the lumber consigned to Stokes & Son, to whom the same was delivered, and it was shipped immediately to Canada. The plaintiff forwarded the bill of lading and draft to Chicago, and demanded the lumber of the C., B. & Q. R. Co., the railroad connecting with defendant, and delivery was refused, because a delivery had already been made to Stokes & Son. Wells Bros. knew of the arrangement between the station agent and Zohn, that the

lumber was to be consigned to Stokes & Son unless Zohn should name another consignee; but this arrangement was wholly unknown to the plaintiff until it was too late to prevent the delivery of the lumber to Stokes & Son.

The plaintiff objected to the parol evidence on the ground that it contradicted the written contract as evidenced by the bill of lading. The objection was overruled and the evidence received, and the court instructed the jury as follows: "(4) You are instructed that the bill of lading, as shown upon its face, does not name a consignee, and does not express the full agreement between the parties; and you are instructed that if Zohn and Wells Bros. consented that at the time the way-bills should be made to Stokes & Son, unless the agent should be advised to the contrary, then it was proper for the said agent to ship said lumber to Stokes & Son, and your verdict should be for the defendant. But if there was no such agreement, then the bill of lading is a contract between the parties thereto, whereby said defendant agreed to transfer said lumber to Chicago to Wells Bros. or their assignee. The burden of proof is upon the defendant to establish said agreement. (5) If you find that Wells Bros. and Zohn went to the bank of plaintiff, in order to get money so that Wells Bros.' claim could be satisfied, and you further find that Wells Bros. assigned their interest to said Henry Zohn, that then Zohn drew a draft on Chicago upon said Wallace, which said draft was cashed by the plaintiff, and Zohn then assigned and delivered the bill of lading to the plaintiff, then you are instructed that it was the duty of plaintiffs, in order to protect their rights, to notify the defendant that they were the owners of said bill of lading; and if you find that the defendant shipped said lumber to Stokes & Son, and said consignment was with the consent of Zohn, and he was satisfied with such assignment, and you further find that the defendant did not know that said bill of lading had been assigned to plaintiff, and had no knowledge of plaintiff's

The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

rights, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

These instructions are complained of by counsel for appellant, and, in connection with the admission of the parol evidence, they present the questions which, in our opinion, are decisive of the rights of the parties. A bill of lading is both a receipt and a contract, and in its character as a contract it is no more open to explanation or alteration by parol than other written contracts. This proposition seems to be conceded by counsel for appellee; and the court below, in the fourth instruction cited above, appears to have been of the opinion that, as the contract did not name any one as consignee, it shows upon its face that it does not express the full agreement between the parties, and the parol evidence was doubtless admitted upon the ground that the contract was partly in writing and partly in parol. It is, however, conceded in the same instruction that, if it was not agreed by parol that Zohn should designate the consignee, then the bill of lading is a contract whereby the defendant agreed to transfer the lumber to Chicago to Wells Bros. or their assignees. We think the proposition that the bill of lading shows on its face that it is an obligation to convey the property to Chicago and deliver to Wells Bros., or their assignees, is correct, and that it is a complete and valid contract not susceptible of explanation by parol, notwithstanding the space left in the instrument for the name of a consignee does not contain the name of any person. It was an obligation to deliver the goods to Chicago to the "consignee or owner." Wells & Co., according to the contract, were consignors, consignees, and owners. In *Chandler v. Sprague*, 5 Metc., 306, it is said: "Ordinarily the name of a consignee is inserted, and then such consignee or his indorsee may receive the goods and acquire a special property in them. Sometimes the shipper or consignor is himself named as consignee, and then the engagement of the ship-owner or master is to deliver them to him or his assigns. Sometimes no person is named; the

The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

name of the consignee being left blank, which is understood to import an engagement on the part of the master to deliver the goods to the person to whom the shipper shall order the delivery, or to the assignee of such person;" citing Abb. Shipp., (4th Amer. Ed.,) 215. See, also, *City Bank v. Railroad Co.*, 44 N. Y., 136; *Low v. De Wolf*, 8 Pick., 101; *Glidden v. Lucas*, 7 Cal., 26. In Hutchinson on Carriers, § 134, it is said: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee, and vest the property in him, the shipper may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named, or to some one for his use. [Citing *Blanchard v. Page*, 8 Gray, 285; *Mitchel v. Ede*, 11 Adol. & E., 888; and other cases.] But, after the carrier or his agent has given one bill of lading or receipt for the goods, he cannot give another, unless the first and all duplicates of the same have been returned to him."

The reason of this rule is obvious. An assignment of a bill of lading operates as a transfer of the title to the property therein described. As is said in *Meyerstein v. Barber*, L. R., 2 O. P., 45: "While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading represents them; and this indorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." Now, it is perfectly manifest that if a carrier may issue a second bill of lading without requiring the return of the first, no reliance can be placed upon any such an instrument by those dealing with the consignor with reference to the property. And the same consequences would ensue if he should be permitted, without the surrender of a bill of lading, to ship the property to any one other than that named

The Garden Grove Bank v. The Hameston & Shenandoah R'y Co.

in the instrument. In view of the well-known fact that the live-stock, grain, and other products of this country are paid for upon advancements made upon bills of lading, just as was done in this case, the interests of commerce seem to require that the rule that no alteration shall be made in contracts of this character without the production of the original should be strictly enforced. The defendant appears to have had due regard to this rule when preparing its blank bills of lading. The last provision therein contained, to-wit, "This bill of lading to be surrendered before property is delivered," was printed across the face of the instrument. It is claimed by counsel that this part of the contract was no part of the mutual obligation, but that it was a provision for the protection of the defendant which it might well waive. It is true, it could, as it did in this case, deliver the property without the surrender of the bill of lading. But it did so at its peril. This bill of lading was issued with a full knowledge that it was intended to procure an advancement of money upon it; but, whether the agent had such knowledge or not, third persons dealing with Wells & Co. were justified in believing that their assignee would receive the property upon the surrender of the instrument.

It is claimed, however, and the court below seems to have been of the opinion, that because a bill of lading is not negotiable the defendant had the right to ship the property to Stokes & Co. by the direction of Zohn, and is not liable to the plaintiff because it had no notice that the bill of lading had been assigned to plaintiff. It is true that a bill of lading is not negotiable. It is, however, assignable, and the assignor may maintain an action thereon in his own name. It possesses attributes not common to the ordinary non-negotiable instruments enumerated in section 2084 of the Code. The instruments there enumerated are obligations for the payment of money, or promises to discharge obligations or debts by the delivery of property. Such obligations may be assigned, but they are "sub-

2. BILL of
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The Garden Grove Bank v. The Humeston & Shenandoah R'y Co.

ject to any defense or counter-claim which the maker or debtor had against any assignor thereof before notice of his assignments."

It is claimed that the defendant, under this statute, may avail itself of any defense it could have interposed against Zohn, because he was the assignor of the plaintiff. A bill of lading is a different character of instrument. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can only be altered or changed; as we have seen, by a surrender of the original, and the contract is that the bill of lading must be surrendered before the property is delivered.

This is a plain contract, which persons dealing with the consignors are justified in believing will be performed. They have also the undoubted right to rely upon the rule that no change can be made in the contract which is issued and sent out into the commercial world, as every business man knows, for the very purpose of using it as the means by which to procure money to move the produce of the country to market. If bankers cannot rely upon bills of lading as being what they plainly import, and in order to protect themselves against private oral agreements between the carrier and the shipper, varying and contradicting the bill of lading, must give notice to the carrier of rights acquired in the property as assignees, it would very seriously embarrass the business interests of the country, and would produce a state of affairs that we think is neither warranted by sound legal principles nor by any consideration of public policy.

We think that the parol evidence should not have been admitted, and that the instructions above set out are erroneous.

REVERSED.

BOWLIN V. LYON ET AL.

1. **Civil Rights: EXCLUSION OF COLORED MAN FROM SKATING-RINK: DAMAGES.** Plaintiff, a colored man, sought to recover damages on account of his exclusion from a skating-rink kept and operated by defendants. But, as it does not appear that it was operated under a license or privilege granted by the state, or by the city in which it was conducted, or that it was in any manner regulated or governed by the police regulations of the city, *held* that it must be presumed to have been conducted as a private business merely, and that no person, black or white, had a right to enter against the will of the proprietors. The case of inn-keepers, carriers of passengers and keepers of licensed places of amusement, distinguished. [But see chap. 105, Laws of 1884, since enacted.]

Appeal from Linn Circuit Court.

FRIDAY, DECEMBER 11.

It is alleged in the first count of the petition that defendants were the proprietors of a place of public amusement in the city of Cedar Rapids, known as a skating rink, and that plaintiff, at a time when said rink was open to the public, applied to them for admission thereto, but that they wrongfully, maliciously and insolently, and without any cause except that he is a colored man, refused to admit him to said rink. In the second count it is alleged that, on another occasion, defendants, by a printed circular, which they caused to be circulated in the community, advertised and announced to the public that said rink would, on an evening which was named in the circular, be opened to all persons on the payment of an admission fee, and that at the time named plaintiff went to said rink and offered to pay the fee charged other members of the public for admission, and requested to be admitted thereto, but that defendants wrongfully, maliciously and insolently refused to receive said fee from him, or to permit him to enter the rink; and that their only reason for treating him in this manner was that he is a colored man.

Bowlin v. Lyon et al.

Defendants demurred to the petition on the ground that it did not appear by the averments thereof that plaintiff had any legal right to enter said skating rink on either of the occasions mentioned in the petition. The demurrer was sustained, and plaintiff appeals.

W. G. Thompson and Albert & Albert, for appellant.

I. N. Whittam, for appellee.

REED, J.—The demurrer admits that plaintiff was excluded from the place in question on the sole ground that he is a colored man; and we will assume, in our consideration of the case, that there was nothing in his character or conduct which rendered him offensive or afforded any ground for excluding him. The single question presented by the record is whether the refusal by the defendants on the occasions mentioned in the petition to permit plaintiff to enter their skating rink was a denial to him of a privilege which he had the right, under the law, to enjoy; and, in the outset, we deem it proper to say that the question whether plaintiff had the right to demand admission to the place is in no manner affected by the fact that he is a colored man. His legal right in the premises is not different from that of white men whose character and conduct are not different from his own. And if a white man of unobjectionable character and conduct could have demanded admission as a legal right on the occasions in question, the refusal of defendants to admit him operated as a denial to him of a legal right; for the law is no respecter of persons, and it guaranties no rights or privileges to one class of citizens which may not be enjoyed by every other class upon the same terms, and under like circumstances. If then the defendants had the right to deny plaintiff admission to their skating rink, this right must be based upon some consideration upon which they might have denied any other man of like character admission to it.

Rowlin v. Lyon et al.

The allegation of the petition is that defendants kept and operated the rink as a place of public amusement, but it is not shown by any averment that the business of operating it is carried on under a license or privilege granted by the state, or the municipal corporation in which it is conducted, or that it is in any manner regulated or governed by any of the police regulations of the city. The reasonable inference from the allegations of the petition is that defendants are the owners of a building in which they permit parties to engage in the exercise of roller skating, for which privilege they charge a consideration, and where exhibitions are sometimes given by experts in the art of skating, on which occasions an admission fee is charged, and that the general public was invited to resort to the place for amusement and recreation. It may be said, as a general rule, that the law does not undertake to govern or regulate the citizen in the conduct of his private business. In all matters of mere private concern he is left free to deal with whom he pleases, and to make such bargains as he is able to make with those with whom he does deal. There are, however, classes of business in the conduct and management of which, notwithstanding they may be conducted by private parties for their own emolument, the general public has such interest as that they are properly the subject of regulation by law, and those engaged in them are subject to restrictions and limitations which do not apply to persons engaged in other kinds of business. Innkeepers and carriers of passengers are of this class. All members of the general public are entitled to demand accommodations from them, and they are bound to afford such accommodations, if they are able to do so. If the innkeeper has room in his house, he is bound to receive and entertain any traveler or wayfaring person who applies for accommodations, and is able and willing to pay a reasonable consideration therefor, and whose character and conduct are unobjectionable; and the carrier is also bound to receive all members of the public who apply for accommodation, and whom he is able to accom-

modate. Story, Bailm., §§ 475, 476. While they have the right, doubtless, to make reasonable and proper rules for the conduct of the business in which they are engaged, they are not permitted to discriminate in favor of or against any class. Nor are they at liberty to refuse accommodations to any whom they are able to accommodate. *Rea v. Ivens*, 7 Car. & P., 213; *Chicago & N. W. Railroad Co. v. Williams*, 55 Ill., 185; *Coger v. Northwestern Union Packet Co.*, 37 Iowa, 145. The ground upon which these restrictions are imposed is that persons engaged in these vocations are in some sense servants of the public, and in conducting their business they exercise a privilege conferred upon them by the public, and they have secured to them by the law certain privileges and rights which are not enjoyed by the members of the public generally.

It may be that the managers of a place of public amusement, who carries on his business under a license granted him by the state, or by a municipal corporation organized under the laws of the state, would be subject to the same restrictions. We incline to think that he would; for, as he carries on the business under an authority conferred by the public, the presumption is that the intention was that whatever of advantage or benefit should result to the public under it should be enjoyed by all its members alike. The power which granted the license represented each member of the public in making the grant, and each member, with reference to those privileges which accrue to the public under it, must be on an equality with every other member. It seems to us, however, that the business conducted by the defendants was not of this character. The public has assumed no control of it, and it does not appear that it is a business in which the public have a concern. Any citizen of the state has the right to establish himself in it at his own election, and no license or authority from the public is required therefor. It seems to us that it is essentially a private business, and that it will remain so until the public assumes some con-

Bowlin v. Lyon et al.

trol of it. Defendants were using their own property in conducting the business, and were carrying it on according to their own notions. When members of the public entered the building, they did so by permission of defendants, or under a contract with them. When they invited the members of the public to go to the place, they offered simply to extend to them permission to enter, or to contract with them for that permission. We see no reason why they might not have limited their invitation to certain individuals or classes. As the place belonged to them, and was under their exclusive control, and the business was a private business, it cannot be said, we think, that any person had the right to demand admission to it. They had the right, at any time, to withdraw the invitation, either as to the general public or as to particular individuals.

The act complained of by plaintiff was the withdrawal by defendants as to him of the offers which they had made to admit him, or to contract with him, for admission. They had the right to do this as to him, or any other members of the public. This right, as we have seen, is not based upon the fact that he belongs to a particular race, but arises from the consideration that neither he, nor any other person, could demand, as a right under the law, that the privilege of entering the place be accorded to him. The legal rights of the parties would not have been different from what they are if defendants had excluded plaintiff on account of the cut of his coat or the color of his hair, instead of the color of his skin; or if they had excluded him without assigning any reason for their action in the premises.*

AFFIRMED.

*It should be noted that the acts complained of in this case occurred prior to the taking effect of chap. 105, Law of 1884.

LUCAS COUNTY V. THE CHICAGO, BURLINGTON & QUINCY
R'Y CO.THE CHICAGO, BURLINGTON & QUINCY R'Y CO. V. UNION
CO.

1. **COUNTIES: POWER TO LEVY POOR TAX:** CHAP. 149, LAWS OF 1876, AMENDING CODE, § 1381: CONSTRUCTION. The effect of Chap. 149, Laws of 1876, amending § 1381 of the Code, is to empower counties having a population of 33,000 inhabitants or more to levy a poor tax of one and a half mills on the dollar, in case the ordinary revenue of the county proves insufficient for the support of the poor, but it does not take away the power, given by the section before amendment to counties containing a less number of inhabitants, to levy a tax of one mill on the dollar for the same purpose.

FRIDAY, DECEMBER 11.

THESE causes present the same questions, and have been submitted together, and will be disposed of in a single opinion. The first case is an appeal from Lucas district court. The other, from Union district court. The facts are stated in the opinion.

T. M. Stuart, for appellant.

Mitchell & Penick, for appellee, Lucas Co.

McDill & Sullivan, for appellee, Union Co.

REED, J.—The causes involve the legality of certain taxes levied by the board of supervisors of the respective counties for the support of the poor. At the time of making the annual tax levy for the year 1884, said boards of supervisors each made an order reciting that the ordinary revenue of the county had proven insufficient for the support of the poor, and levying a tax of one mill on the dollar on all the taxable property in the county for that purpose. The counties each

Lucas County v. The Chicago, Burlington & Quincy R'y Co.

have a population of less than 33,000 inhabitants. It is admitted that the ordinary revenue of the counties was insufficient for the support of the poor within them, and the single question presented by the case is whether the boards of supervisors had power, under the statute, to levy the taxes in question. Prior to 1876 the powers of the board of supervisors with reference to the levying of taxes for the support of the poor were defined by section 1381 of the Code. The provision is as follows, viz.: "The expenses of supporting the poor-house shall be paid out of the county treasury in the same manner with other disbursements for county purposes; and, in case the ordinary revenue of the county prove insufficient for the support of the poor, the board may levy a poor tax not exceeding one mill on the dollar, to be entered on the county list, and be collected as ordinary county taxes."

The legislature in 1876 passed an act to amend this section. The act is chapter 149 of the Acts of the Sixteenth General Assembly, and it is as follows: "Section 1. That section 1381, tit. 11, chap. 1, Code, be amended by striking out the words 'one mill' in the fifth line of the said section and inserting therein in lieu thereof the words 'one and a half mills,' so that the section will read as follows: Sec. 1381. The expenses of the poor-house shall be paid out of the county treasury in the same manner with other disbursements for county purposes; and, in case the ordinary revenue of the county prove insufficient for the support of the poor, the board may levy a poor tax not exceeding one and a half mills on the dollar, to be entered and collected as the ordinary county tax: provided, that the provisions of this act shall not apply to counties in which the population is less than thirty-three thousand (33,000) inhabitants."

The question to be determined is as to the effect of the enactment. It is contended by appellant that its effect is to strike out absolutely from the section the words "one mill," and insert in lieu thereof the words "one and a half mills,"

and that the proviso is made part of the section as amended, and has the effect to limit its operation to counties having a population of 33,000 inhabitants, or more; and hence that in counties having less than that number of inhabitants the board of supervisors has no power to levy a special tax in any amount for the support of the poor. In our opinion, however, this position cannot be maintained. The proviso was intended by the legislature, we think, as a limitation of the amendatory act, and it does not constitute any part of section 1381 as amended. This view is sustained by a number of considerations. In the first place, the act is simply amendatory of section 1381. It does not repeal and re-enact that section, but strikes out certain words from it, and inserts others in lieu of them. The other provisions of the section are in no manner affected by the act, but remain in force just as they were before it was enacted. It was passed simply for the purpose of modifying the section. The language of the proviso is "that the provisions of *this act* shall not apply," etc. What act is referred to? Clearly not the section of the Code; for that, as we have seen, is not repealed and re-enacted. But the words "this act" designate the amendatory act,—that is, the act in which they are used. There is no other subject to which they can relate.

In the next place, the language preceding the proviso clearly indicates an intention by the legislature to amend the section in the single respect of striking out the words "one mill" and inserting "one and a half mills." The language is "that section 1381 * * * be amended by striking out the words 'one mill,' in the fifth line, * * * and inserting therein in lieu thereof the words 'one and a half mills,' so that the section will read as follows;"—and this is followed by the amendment, and there is no provision expressly making the proviso a part of the section. We think it clear, then, from the language made use of, that the proviso was intended as a limitation of the amendatory act, and that it does not constitute any part of

 Shuver v. Klinkenberg.

the section as amended. If the construction contended for by appellant were correct, it would follow, not only that the boards of supervisors in counties having less than 33,000 inhabitants have no power to levy a special tax for the support of the poor, but that they have no power to pay the expense of supporting the poor-house out of the general fund of the county; for section 1381 contains the only provision authorizing the payment of such expenses; and if said proviso is part of that section, the power to pay such expense is limited by it to counties having 33,000 inhabitants or more. Nobody believes that such a result was intended by the legislature when it enacted the statute in question, and there is nothing in the language of the act which requires us to put a construction upon it which would lead to that result. The effect of the amendatory statute is to empower counties having a population of 33,000 inhabitants or more to levy a poor tax of one and a half mills on the dollar, but the power conferred upon counties having a less number of inhabitants by the section before it was amended to levy a tax of one mill for such purpose is not taken away. This is the view taken by the district court. The judgments will be

AFFIRMED.

SHUVER V. KLINKENBERG.

1. **Forcible Entry and Detainer: NOTICE TO QUIT: MORE THAN THREE DAYS: JURISDICTION.** Where the tenancy in question ended by agreement March 29th, and April 4th the lessor gave the lessee written notice to quit by the 5th day of May, *held* that, as the thirty days' notice required by § 2015 of the Code was not necessary, (*Grosvenor v. Henry*, 27 Iowa, 269,) an action of forcible entry and detainer could be maintained on the notice so given, as it answered the purpose of the three days' notice required by § 3614. Defendant could not complain that more than three days notice was given.
2. —: **ORIGINAL NOTICE: TIME FOR APPEARANCE: JURISDICTION.** The fact that the original notice in an action of forcible entry and

67	544
98	538

67	544
118	600

Shuver v. Klinkenberg.

detaimer was served nine days before the time fixed for appearance, in contravention of § 3617 of the Code, was a mere irregularity not depriving the court of jurisdiction to render judgment by default against defendant, and a motion to vacate the judgment and dismiss the action for want of jurisdiction was properly overruled. Compare *Shea v. Quintin*, 30 Iowa, 58.

Appeal from Butler Circuit Court.

SATURDAY, DECEMBER 12.

THE plaintiff commenced an action of forcible entry and detainer against the defendant before a justice of the peace. The defendant did not appear at the time fixed in the original notice. A default was entered, and, after hearing the proofs, a judgment was entered for the plaintiff. Two days afterwards the defendant filed a motion "to vacate the judgment and dismiss the complaint." The motion was overruled on the same day. Thereupon the defendant sued out a writ of error, and upon return of the writ the circuit court reversed the ruling of the justice, and remanded the cause, with instructions to the justice to sustain the motion. The plaintiff appeals.

J. H. Scales, for appellant:

O. B. Courtright, for appellee.

ROTHROCK, J.—The petition filed before the justice of the peace avers in substance that plaintiff leased a town lot to the defendant for the term of one year, and that defendant, at the end of the year, refused to quit the premises. The lease expired on the twenty-ninth of March, 1884. That on the fourth day of April, 1884, the plaintiff served a written notice on the defendant to quit the possession of the lot by the fifth day of May, 1884. The original notice in the action was served on the defendant on the eighth day of May, 1884, and required the defendant to appear before the justice of the

Shuver v. Klinkenberg.

peace on the seventeenth day of that month. The motion upon which the justice made the ruling demanded that the judgment be vacated and the complaint dismissed, on the ground that the court had no jurisdiction of the subject-matter, as the records show that three days' notice to quit was not served on the defendant, and for the further reason that the court had no jurisdiction of the defendant, or of the subject-matter, as shown by the the original notice, and the return thereon, as returned by the officer serving the same.

Two questions appear to be raised by this motion. The first is that a three days' notice to quit was necessary to be

1. **FORGIBLE**
entry and de-
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to quit: more
than three
days: jurisdic-
tion.

given to the defendant in order to give the justice jurisdiction of the cause. It is true that, under section 3614 of the Code, before a suit of this kind can be brought, three days' notice to quit must be given to the defendant in writing. It appears that a notice was given, but that it was some thirty days before the suit was brought. We think that the defendant cannot complain because she was allowed more than three days after service of the notice in which to surrender the possession. The defendant was not entitled to the thirty-days' notice provided by section 2015 of the Code, because the tenancy ceased at the time agreed upon, which was one year. *Grosvenor v. Henry*, 27 Iowa, 269. Even if the defendant may, under the statute, demand that the notice shall be exactly three days, a service of a notice for a longer time would not affect the jurisdiction of the justice. It was nothing more than a mere irregularity.

Next, the motion raises a question to the effect that the justice had no jurisdiction on account of defect in the orig-

2. — : orig-
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time for ap-
pearance: ju-
risdiction.

inal notice. We are not advised by the record what the alleged defect is. We cannot determine from the record whether any defect was brought to the attention of the justice of the peace or the circuit court. We have examined the statute to ascertain, if possible, what the defendant complains of in regard to the orig-

Wallace v. The Chicago, St. Paul, Minneapolis & Omaha R'y Co.

inal notice. It appears from section 3617 of the Code that the time for appearance and pleading in this proceeding must not be less than two nor more than six days from the time the notice is served on the defendant. It appears that the service was made in this case nine days before the time fixed for an appearance. If this defect is the one complained of, it cannot avail the defendant. It was not the case of a want of notice. The notice was merely defective, and did not affect the jurisdiction of the justice. *Shea v. Quintin*, 30 Iowa, 58; *Dougherty v. McManus*, 36 Iowa, 657. The first of the above cited cases is in principle precisely in point on this question.

It will be observed that the defendant did not, in her motion, ask that the default be set aside because of the irregularities of which she complained, and that she should be permitted to defend the action. The demand was that, as the justice had no jurisdiction, the judgment must be vacated and suit dismissed. We think the justice was correct in his ruling, and that the circuit court erred in remanding the cause, with directions to the justice to sustain the motion.

REVERSED.

WALLACE V. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA
R'Y Co.

1. **Contract: NEGLIGENCE IN SIGNING WITHOUT READING: ESTOPPEL.**
Where plaintiff had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but he chose to rely upon what another said about it, he is estopped by his own negligence from claiming that it is not legal and binding upon him, according to its terms. See opinion for cases followed.

Appeal from Woodbury District Court.

SATURDAY, DECEMBER 12.

67	547
89	656
67	547
6104	637
105	225
67	547
108	160
67	547
112	604
67	547
129	50
67	547
135	604
67	547
137	68

Wallace v. The Chicago, St. Paul, Minneapolis & Omaha R'y Co.

THE plaintiff, who was a train conductor on defendant's railroad, claims damages for a personal injury which he alleges he received by reason of the negligence of the defendant in failing to surface up and fill in earth between the ties upon which the iron rails of the track were laid. There was a trial by jury. Verdict and judgment for plaintiff. Defendant appeals.

J. H. & C. M. Swan, for appellant.

S. J. Quincy and Isaac Pendleton, for appellee.

ROTHROCK, J.—The plaintiff was the conductor of a transfer train engaged in moving cars across the Missouri river between Sioux City, Iowa, and Covington, Nebraska, by means of boats, and in making up trains and switching cars upon transfer tracks and side tracks. These transfer tracks were not permanent structures. By reason of the changing of the channel and banks of the river, the landing of the boats and the transfer tracks were required to be frequently moved. The tracks were laid down in a temporary manner, and the spaces between the ties were not filled up, and the ties were not placed at uniform distances from each other. The plaintiff claims that in attempting to make a coupling on one of these tracks at Covington, and while the cars to be coupled were in motion, his foot caught between two ties, and in attempting to extricate it he involuntarily threw up his hand in such a position that it came between the draw-heads of said cars, and he was severely injured. He was in full command of the train, and the cars were moving by his direction, and he makes no complaint of any negligence of the engineer or other train-men; and he admits that he was aware of the condition of the track. But he alleges that the defendant was negligent in the construction of the track, and that he made complaint of the track to the proper officers of the company, and that they promised to repair and properly construct it, and that the injury was received by reason of

Wallace v. The Chicago, St. Paul, Minneapolis & Omaha R'y Co.

the negligence of the defendant to keep its promise to make the proper repairs. The injury was such that it became necessary to amputate the third and fourth fingers of the left hand. Soon after the injury the plaintiff resumed work for the company, and continued in said employment for several months.

It is urged by counsel for appellant that the evidence does not show that the plaintiff made any complaint of the condition of the track in question to any officer of the defendant who had any authority over repairs upon the road, and that the evidence shows, without conflict, that the injury was properly attributable to the plaintiff's own carelessness and negligence. We do not deem it necessary to determine these questions, because, in our opinion, the judgment must be reversed upon another ground, which we will now proceed to consider.

II. The defendant, as a full defense to the action, pleaded that in February, 1883, several months after the injury was received, the plaintiff and the defendant made a full and fair settlement of all claims for damages by reason of said injury, and the defendant, in pursuance of said settlement, paid the sum agreed upon, to the full satisfaction of the plaintiff. Said settlement and the release were in writing, signed by the plaintiff. These instruments were introduced in evidence. It is unnecessary to set them out here. It is sufficient to say that they are a full acquittance and discharge of the defendant for all damages for the injury complained of. The injury is so fully described therein that no one could read the writings without knowing that they were a settlement of all claims for damages on account of the cause of action upon which the suit was brought. The defendant showed, by the testimony of its station agent at Covington, that he read the release to the plaintiff, and that he affixed his signature thereto with full knowledge of its contents, and that the witness had several conversations with the plaintiff

Wallace v. The Chicago, St. Paul, Minneapolis & Omaha R'y Co.

before the settlement was made, and that the amount was agreed upon and fully understood by plaintiff.

The plaintiff claimed that the release was obtained from him by fraud, and was not binding upon him for that reason. To establish the charge of fraud he testified, in substance, that when he signed the writings they were not read over to him, but that the agent who procured his signature thereto stated to him that they were vouchers for his back pay, and that he had no knowledge of the contents of the writings which he signed. The plaintiff was a man of sufficient intelligence to be a railroad conductor. He had been deputy sheriff of Woodbury county, and could read writing and make out papers and transact any kind of ordinary business. He stated in his testimony that there was nothing to hinder him from reading the papers before signing them, and nothing was done to keep him from reading them. An examination of all the facts and circumstances disclosed in the evidence leads the unprejudiced mind to the conclusion that the plaintiff was fully aware of the contents of the writings when he signed them. But that was a question for the jury. The question for us to determine is, did the plaintiff show that his signature was procured by fraud, conceding his own testimony to be true? Or, rather, did he show such a state of facts as that a jury might properly find that the contract which he signed was procured by fraud? We think it is very clear that his testimony did not authorize the finding of the jury. He was laboring under no infirmity which prevented him from reading the writings, as by reason of defective sight, or the like. He does not claim that he requested the instruments to be read to him, and that the contents were purposely misrepresented in the reading, or that he was deceived by any slight of hand, legerdemain, or artifice. On the contrary, he admits that he could have read the papers, and that he had full opportunity to do so, and the words "release of damages," in bold-faced printed letters, were at

Furchner v. Edmonds.

the head of the release, and could have been seen at a mere glance.

The defendant requested the court to charge the jury as follows: "(3) That if you find that the plaintiff had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but that, having full opportunity to read it before signing, he chose to rely upon what Mr. Flint said about it, he is estopped by his own negligence from claiming that the same is not legal and binding upon him, according to its terms." This request to charge was refused. It should have been given. It is in exact accord with the cases of *Bell v. Byerson*, 11 Iowa, 233; *McCormack v. Molburg*, 43 Id., 561; and *McKinney v. Herrick*, 66 Id., 414. See, also, Pars. Cont., 772; Kerr, Fraud & Mistake, 77.

REVERSED.

FURCHNER V. EDMONDS.

1. **Payment: EVIDENCE CONSIDERED AND JUDGMENT AFFIRMED.**

Appeal from Plymouth District Court.

SATURDAY, DECEMBER 12.

ACTION in chancery to foreclose a mechanic's lien for work done in erecting a building. There was a decree for defendant. Plaintiff appeals.

Struble, Rishel & Sartori, for appellant.

Argo, Kelly & Augir, for appellee.

BECK, CH. J.—There was no dispute between the parties involving the terms of the contract between them, or the per-

Card v. Dale.

formance thereof by plaintiff. They only differ upon the question of a single payment. Each party was a witness in his own behalf. Defendant testified positively that he made a payment of \$1,000 to plaintiff during the progress of the work; plaintiff as positively denied it. We think defendant's testimony is sufficiently corroborated to outweigh the evidence in plaintiff's behalf. This corroboration is by quite clear testimony of at least one witness, and by circumstances shown by others. It is true that the testimony given by plaintiff is not without corroboration to some extent, but we are satisfied that the weight of the evidence is upon defendant's side of the case. The decree of the district court must be

AFFIRMED.

CARD V. DALE.

1. **Division Fence: NOT ON TRUE DIVISION LINE: OBLIGATION TO MAINTAIN.** If parties use a fence as a partition between their farms, it is wholly immaterial whether it is on the exact boundary line or not, so far as the obligation to maintain the fence or contribute to its construction is concerned.

Appeal from Harrison District Court.

SATURDAY, DECEMBER 12.

THIS controversy involves the rights of the parties in regard to a fence between their farms. The plaintiff brought the action to recover an award of eighteen dollars made by the township trustees, as fence viewers. There was a trial by jury, and a verdict and judgment for plaintiff. Defendant appeals.

S. H. Cochran, for appellant.

L. R. Bolter & Sons, for appellee.

ROTHROCK, J.—The case involves less than \$100, and it comes to us upon the following certificate of the trial judge: “1. Is the following instruction given by the court, to-wit: ‘If the fence built by plaintiff was on the line between the plaintiff’s and defendant’s lands, or was so near the line as, in your judgment, to serve the purpose of a line fence for the parties who owned the land on either side of the fence, then it may be regarded as a partition or line fence,’—a correct definition of the term ‘division fence,’ as used in section 1498, Code, 1873; or is a division fence, one on the exact true line? 2. What is the meaning of the term ‘division line’ when applied to partition fences as contemplated by section 1498, Code, 1873?” Counsel have argued the facts and the law of the case under several assignments of error. They do not seem to understand that in this class of cases they have no right to an appeal, and that this court is not authorized to determine anything but the questions of law certified by the trial judge. It depends altogether upon the facts in a case whether a fence is a partition fence. The question certified contemplates that the fence in controversy served the purpose of a partition fence; that is, that the parties used it as such. Now, if this was the fact, the instruction was, doubtless, correct. If parties use a fence as a partition between their farms, it is wholly immaterial whether it is on the exact boundary line, so far as the obligation to maintain the fence or contribute to its construction is concerned. It will be presumed that the fence in question was so near the boundary line between the farms, and that the parties had used it as a partition fence for such a length of time, as to authorize the instruction given by the court to the jury.

AFFIRMED.

67	554
80	36
67	554
132	468

THE STATE V. ORTON.

1. **Habeas Corpus:** MATTERS NOT REVIEWED BY. *Habeas corpus* cannot be invoked for the purpose of obtaining relief for mere errors and irregularities of a court in a criminal trial, nor for the purpose of determining whether the offense for which the plaintiff is imprisoned is a crime under the statute, nor for the purpose of correcting an erroneous taxation of costs.

Appeal from an order of the Hon. E. E. Aylesworth, Judge of the Superior Court, Council Bluffs.

SATURDAY, DECEMBER 12.

AN information was filed before a justice of the peace charging defendant with the crime of disturbing a worshipping congregation. He was convicted, and the justice adjudged that he should pay a fine of \$25 and costs, and, in default of immediate payment, that he should be confined in the county jail for the period of eight days. A *mittimus* was served, and the defendant taken into custody by the sheriff. Thereupon, a writ of *habeas corpus* was sued out, and the defendant discharged. The state appeals.

Stone & Gilliland and *A. B. Thornell*, for the State.

No appearance for appellee.

SEEVERS, J.—The justice, under section 4023 of the Code, had undoubted jurisdiction of the crime charged in the information. In the petition for the *habeas corpus* the defendant claimed that he was entitled to be discharged from custody on three grounds only. The first is that there was a jury trial, and that the jury returned a sealed verdict, and thereon the judgment was rendered; the second is that the defendant was not guilty of any crime known to the laws of Iowa; and

 Hunter v. Waynick et al.

the third is that the judgment included the costs, and that illegal fees for costs were taxed.

Conceding that all these grounds existed, the defendant was not entitled to be discharged. The return of a sealed verdict by the jury, and the reception of the same by the justice, may have been irregular and erroneous, but clearly it did not have the effect of ousting the justice of jurisdiction. *Habeas corpus* cannot be invoked for the purpose of obtaining relief for mere errors and irregularities of a court. The question whether a crime was committed by the defendant cannot be determined on *habeas corpus*, and it cannot be seriously claimed that an erroneous taxation of costs can be. The foregoing views are supported by *Platt v. Harrison*, 6 Iowa, 79; *Zelle v. McHenry*, 51 Id., 572; *Jackson v. Boyd*, 53 Id., 536.

The order of the judge of the superior court of Council Bluffs, discharging the defendant from custody, is therefore

REVERSED.

67	555
83	458
67	555
100	602

HUNTER V. WAYNICK ET AL., DEFENDANTS, AND CHAPIN & MERRITT, INTERVENORS.

1. **Partnership: POWER TO SELL FIRM PROPERTY.** One partner does not have the power to sell the entire property of the firm without the knowledge and consent of his partner, who, though absent, might easily be consulted by mail or telegraph, and a sale so made will be set aside in equity where the purchaser knew the facts at the time of purchasing.

Appeal from Shelby Circuit Court.

SATURDAY, DECEMBER 12.

ACTION IN EQUITY. Decree for the plaintiff and intervenors. The defendant Kestler appeals.

Wicks & Burke, for appellant.

D. O. Stuart and *Macy & Gammon*, for plaintiff.

Lehman & Park, for intervenors.

SEEVERS, J.—The plaintiff and defendant Waynick were partners, engaged in the retail grocery business at Harlan. The plaintiff resided at Corning, and was occasionally at Harlan, and had some personal knowledge of the business. On the second day of February, 1884, the defendant Waynick sold the goods, wares and merchandise, and all partnership property, to the appellant, Kestler, for the sum of \$3,000. This sale was made without the knowledge or consent of the plaintiff, and he and the partnership creditors ask that it be set aside on the ground that it was fraudulent, and because the defendant Waynick did not have power and authority to make it. There is some evidence which has a tendency to establish the fraudulent character of the sale, but we shall not refer more particularly thereto, for the reason that we are of the opinion that the sale must be set aside upon the other ground.

It is said there is some conflict of authority as to the power of one partner, without the knowledge or consent of his copartner, to sell or assign all the partnership property. Conceding this to be so, such question must be regarded as settled in this state. It was held in *Loeb v. Pierpoint*, 58 Iowa, 469, that one partner did not have such power, where his copartner resided in the same town and could have been readily consulted. The difference between that case and this is that in the present case the plaintiff resided about seventy-five miles distant from Harlan, where the sale was made. But there was a daily mail by railroad between the two places, and also a telegraph line. There was no reason for making the sale at the time it was made, except a simple desire on the part of the resident partner to do so. There

The State v. Stevens.

is no evidence tending to show that a few hours' or days' delay would have been detrimental to the interest of one or both of the partners. For all practical business purposes, except some urgent necessity, the plaintiff could readily have been consulted before such an important step as a sale of the whole partnership property was taken. The means of consulting were as convenient as those in the case above cited. The sale was concluded about eleven o'clock, and the plaintiff was informed of it that evening, and the next day he was in Harlan protesting against it. Practically the plaintiff was present when the sale was made, and yet he was not consulted. The appellant had knowledge of the partnership, the residence of the plaintiff, and that he was not consulted.

AFFIRMED.

THE STATE V. STEVENS.

1. Criminal Evidence: ACTS AND ADMISSIONS OF CONFEDERATES.

Where defendant was indicted with others for the commission of a crime, but he was tried separately, and the crime was clearly established, evidence which tended to show that defendant and those connected with him were familiar associates and confederates for the commission of crime, and which tended to connect defendant with the crime, was admissible.

2. ———: ATTEMPT TO ESCAPE. An attempt to escape from custody, as well as an actual escape, may be shown as tending to establish guilt.

3. Criminal Law: FAILURE OF DEFENDANT TO TESTIFY: DUTY TO INSTRUCT AS TO EFFECT OF. In the absence of a request from the defendant, it was not reversible error for the court to neglect to instruct the jury that the fact that defendant did not testify in his own behalf was not to be considered to his prejudice.

4. ———: PROLONGATION OF TRIAL: ADJOURNMENT OF COURT IN OTHER COUNTY. The statute does not fix a day for the ending of a term of court, but it does authorize the judge, for a sufficient cause, to adjourn a term before it is begun. (Code, § 169.) So, where the approaching term in another county was adjourned, and the trial of this cause was prolonged into the time when court would otherwise have been in

67	557
98	686
67	557
106	498
67	557
108	79
108	76
67	557
123	128
67	557
134	154
67	557
135	51

The State v. Stevens.

session in the other county, *held* no error. (See *State v. Peterson*, *post*, p. 564.)

Appeal from Hardin District Court.

SATURDAY, DECEMBER 12.

DEFENDANT was convicted of burglary, and now appeals to this court.

Tom H. Milner, for appellant.

A. J. Baker, Attorney-general, for the State.

BECK, CH. J.—I. The defendant was indicted, with two others, for burglary committed by breaking into a jewelry store and taking goods and money of the aggregate value of \$678. Upon his request he was tried separate from his co-defendants.

II. Various objections were made to testimony on the trial, showing acts and conversation of the other persons indicted with defendant, which tended to establish familiar relations and association of all the parties; that they were in company about the time of the commission of the crime, and other matters tending to connect defendant therewith. Evidence as to certain bonds found in the possession of the defendants was also made the subject of objection. All of these objections may be disposed of upon the consideration that the evidence tends to connect defendant with the crime, the commission of which was clearly established. It tends to show that defendant, and those connected with him, were familiar associates and confederates for the commission of crime.

III. Evidence was admitted, against defendant's objection, tending to show an attempt or effort on the part of defendant to escape from custody. It is admitted by counsel for defendant that an escape and flight may be shown as a fact tending to establish guilt; but

1. CRIMINAL
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acts and ad-
missions of
confederates.

2. ———: at-
tempt to es-
cape.

The State v. Stevens.

it is insisted that an attempt to escape cannot be proved. We discover no distinction between an actual escape and an attempt to escape. Each equally tends to show a consciousness of guilt, and is therefore alike admissible against the accused.

IV. Certain instructions as to the effect of evidence of possession of property recently stolen are made the subject of criticism. They present the familiar rules upon this subject in language sufficiently clear and certain. The same remark may be made applicable to instructions applying the doctrine of reasonable doubt to different branches of the case. Counsel, in their objections to these instructions, fail to recognize the obvious meaning of their language. The instructions present rules as they are laid down and recognized in decisions of the courts.

V. The defendant did not testify in his own behalf. His counsel now urge that the court erred in not instructing the jury that this fact was not to be considered to his prejudice. Had such instruction been requested it doubtless would have been given. In the absence of this request, we do not think it was the duty of the court to allude to the matter. It cannot be presumed that defendant's case was prejudiced by his silence, in the absence of any allusion thereto by the state, the court, or any person connected with the case.

VI. Pending the trial in the district court, the judge made an order adjourning the term to be next held in another county, for one week; this was done in order to give sufficient time to complete the trial of this cause, which proceeded after the day fixed for the commencement of the next term, had it not been adjourned. It is now insisted that the trial was had and completed during a time fixed for the court to be held in another county. But section 169 authorizes the judge, for sufficient cause, to adjourn a term before it is begun. The term following the one at which defendant's trial was

3. CRIMINAL
law: failure
of defendant
to testify:
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effect of.

4. —: pro-
longation of
trial: ad-
journment of
court in other
county.

Siebold v. Davis et al.

commenced was lawfully adjourned, and nothing prevented the continuance of the trial during the time at which the next term would have been held had it not been adjourned. The statute does not fix a day for the ending of a term. It may continue until the next term in another county should be commenced.

We think defendant had a lawful and fair trial, and the evidence well supports the verdict. We discover no errors in the proceedings. The judgment of the district court is

AFFIRMED.

SIEBOLD V. DAVIS ET AL.

1. **Principal and Agent: SALE OF LAND: EXCESS OF AUTHORITY: SPECIFIC PERFORMANCE.** The evidence in this case (see opinion) shows that the agent with whom plaintiff dealt in the purchase of the land in question was a special agent, whose limited authority was known to plaintiff, and that the contract was in excess of such authority. *Held* that the principal was not bound by the contract, and that specific performance could not be decreed.
2. **Sale of Land: ACCEPTANCE OF PROPOSITION: WHAT IS NOT.** There is no contract of sale unless the proposition to sell is accepted in all its terms and without conditions. So there was no sale of the land in question, where the offer was to take notes payable annually, but the notes proposed to be given were payable at the option of the maker, and where the acceptance of the offer was conditioned upon a fact yet to be ascertained.

Appeal from Woodbury District Court.

SATURDAY, DECEMBER 12.

ACTION in chancery to enforce the specific performance of a contract for the sale and conveyance of land. The relief prayed for in the petition was denied by the decree of the court below. Plaintiff appeals.

Siebold v. Davis et al.

Joy, Wright & Hudson, for appellant.

J. S. Lawrence and J. H. & C. M. Swan, for appellee.

BECK, CH. J.—I. The petition alleges that defendant Pierce, being the owner of certain land, authorized his agents, Ostrom & Mensinger, to contract for him its sale and conveyance; that plaintiff entered into a contract for the purchase of the land with these agents, and in pursuance thereof paid a part of the purchase money, and entered into the possession of the land, and that Pierce subsequently sold and conveyed the land to his co-defendant Davis. The defendants deny that the agents were authorized to sell the land on the terms accepted by them, of which plaintiff had full knowledge. The evidence shows that Ostrom & Mensinger, as agents of Pierce, had sold for him other tracts of land, and had negotiated the sale of the tract in question, before the alleged sale involved in this case to other parties, which had not been consummated on account of some supposed defect in the title. These agents then had a negotiation with plaintiff, who offered \$2,000 for the land; \$500 cash, and the balance in five equal payments. This offer was communicated by them to Pierce, with a request that he send in reply an abstract of the title to the land. They received the following reply to their letter:

“SIOUX CITY, IA., February 19, '84.

“*Messrs. Ostrom & Mensinger, Danbury, Ia.*,—DEAR SIRS: At your request I enclose abstract of title, which please examine and return. You see I have both titles now, as Goss sued the R. R. Co., and they defended, and the court gave a good decree. No better title in the United States. I will only make three notes of \$500 each for balance. They can have all the time they want,—say 3, 4, and 5 years,—but I won't make little bits of payments out of \$1,500. Will pay you a full commission, which is \$75, being 5 per cent.

Siebold v. Davis et al.

on first \$1,000, and 2 per cent on excess, which is what I always get from my clients.

“JOHN PIERCE.

“Come up quick, as I am on a trade with another party at Denison.”

This letter was received the day after its date, and read by the agents to plaintiff. They gave him the abstract accompanying it. Thereupon they entered into a contract with plaintiff, as disclosed by a receipt executed by them in the following language:

“DANBURY, IA., February 21, 1884.

“Received from W. F. Siebold five hundred dollars, (\$500,) being the first payment on S. E. $\frac{1}{4}$ sec. 17, in township 86, range 42 west of 5th P. M., containing, according to government survey, 160 acres, more or less, which he has purchased for the sum of \$2,000, to be paid as follows, to-wit: \$500 in hand paid, the receipt whereof is hereby acknowledged, and the balance of the \$2,000 in three equal annual payments, the first deferred payment on or before three years from date of deed. All deferred payments to draw interest at 8 per cent per annum, payable annually, at Sioux City, the deferred payments to be secured by mortgage on above-described land.

“OSTROM & MENSINGER,

“Agents for John Pierce.”

The day following the execution of this receipt they wrote the following letter to Pierce:

“DANBURY, IA., February 22, '84.

“*John Pierce*,—DEAR SIR: Enclosed find abstract of title. Bring it down to date, and show that all taxes are paid, and if the decree is not appealed from, and you bring the abstract down to date, everything will be all satisfactory, and you can send abstract, deed and mortgage, either to us or to the express office, and \$500 will be paid less commission; the deferred payments as follows, to-wit: Three equal annual

payments, 3, 4, and 5 years' notes, made on or before. Make deed to W. F. Siebold, but if this decree is appealed from Mr. S. does not want it. Please attend to this at once. The consideration, you understand, is \$2,000.

"OSTROM & MENSINGER."

On the twenty-third of February, Pierce sold and conveyed the land to Davis.

II. Counsel for plaintiff insist that Ostrom & Mensinger were the general agents for Pierce. We think the evidence does not support this position. But whatever may have been the character of their agency as to prior transactions, it was surely special and limited as to this transaction. They were restricted to the terms of sale dictated by Pierce, of which plaintiff had full knowledge. A consideration of the facts above stated will leave no doubt upon this point. A familiar rule of the law restricts the exercise of power by a special agent to the limits prescribed by the principal, and one dealing with such agent, with knowledge of the limitation upon his power, cannot enforce a contract made by him for his principal which is beyond such limitation.

III. It will be observed that the agents were directed to extend the time of the deferred payments to three, four and five years. This was coupled with the instruction that the purchasers could "have all the time they want." But it clearly appears from Pierce's letter of February 19th that payments were to be made annually. No authority is given therein to provide for payments to be made at the option of the purchaser before the days fixed therefor. The contract of sale, as shown both by the receipt and the agent's letter of February 22, authorized payments to be made of at least the first installment before such time. In this regard the contract of sale exceeded the limits of the agents' authority, and is not therefore binding upon the principal.

IV. It may be further remarked that the letter of Ostrom & Mensinger, of February 22, shows nothing more than a

2. SALE of
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is not.

The State v. Peterson.

conditional offer to purchase. It was dependent upon the fact that some appeal had not been taken. Nothing of the kind is made a condition in Pierce's letter of authority to the agents. He was therefore authorized, upon receipt of the agent's letter, to regard his prior offer as not accepted.

Under these views of the case, the plaintiff had no contract which equity will specifically enforce. The decree of the district court is

AFFIRMED.

THE STATE V. PETERSON.

1. **Practice in Supreme Court: CRIMINAL CASE: APPELLANT'S ABSTRACT ILLEGIBLE: CAUSE REVIEWED ON ABSTRACT OF ATTORNEY-GENERAL.** Defendant had leave to present his appeal in writing, but his abstract was almost illegible, and was otherwise defective. The attorney-general filed a complete abstract of the record, which was not denied, and the appeal was disposed of on this abstract.
2. **Larceny: PRESUMPTION FROM POSSESSION OF STOLEN GOODS: EVIDENCE TO OVERCOME.** The instruction complained of in this case (see opinion) sufficiently stated the rule announced in *State v. Richart*, 57 Iowa, 245, and *State v. Hopkins*, 65 Id., 240, that the presumption of guilt arising from the possession of recently-stolen goods is overcome when the evidence is such as to raise a reasonable doubt whether the defendant did not honestly come into possession of the goods.
3. **Practice on Appeal: ERROR MUST BE SHOWN IN RECORD.** A complaint made in argument, that the district attorney was guilty of prejudicial misconduct, cannot be reviewed when the record does not show what the misconduct was.
4. **Criminal Law: PROLONGATION OF TRIAL: TIME FOR COURT IN OTHER COUNTY OF DISTRICT.** Where a pending criminal trial cannot be finished before the time set for court in another county in the district, the judge may adjourn for a time the court in the other county for the purpose of concluding the trial. Compare *State v. Stevens*, ante, p. 557.

Appeal from Hardin District Court.

SATURDAY, DECEMBER 12.

87	564
98	686
87	564
118	98
87	564
144	287

The State v. Peterson.

THE defendant was tried, convicted, and sentenced to imprisonment in the penitentiary, for the crime of larceny from a building in the night-time, and he appeals.

T. H. Milner, for appellant.

A. J. Baker, Attorney-general, for the State.

ROTHROCK, J.—I. On the night of the seventh of August, 1883, the jewelry store of J. W. Smith, at Union, Hardin county, was broken into and entered, and money, jewelry and watches, of the value of about \$700, were stolen therefrom. The defendant, Peterson, and one Maurice and one Stephens were arrested about three days after the crime was committed, at Moline, Illinois, with nearly all of the stolen property in their possession. They were brought to Hardin county and jointly indicted for the crime. They demanded separate trials, and the defendant, Peterson, was convicted and sentenced to the penitentiary for ten years. There was no direct evidence that the three persons named stole the money and property. The evidence shows, however, that they were traveling about the country together for a month or more preceding the time of the larceny. They were at Union, at Marshalltown, at Grundy Center, and at other places. They had no occupation or business. They each passed under one name at one place and another name at another place. When they traveled, they usually adopted that inexpensive mode of conveyance known as free rides on freight trains. They were at Marshalltown on the evening before the crime was committed, which place is some twenty miles by rail from Union, and there was a train from the former place to the latter early in the night. When arrested at Moline they pretended not to be acquainted with each other. They stopped at a hotel, and the defendant, Peterson, delivered a satchel, which contained most of the stolen goods, to the hotel clerk. After he was arrested he denied being the owner of the satchel. These facts are not disputed. The defendant, Peterson, tes-

The State v. Peterson.

tified as a witness in his own behalf. He stated that he was in Marshalltown all of the night of August 7, and on the next day he went fishing and found the stolen goods partially covered with grass, and that he borrowed the satchel and put the goods in it, and on that night he started with the goods in the satchel, and made his way for Moline, traveling mostly on freight trains.

As is usual with men of this character, they were defended at the expense of the county by counsel appointed by the court, and their counsel, not being content with the judgment of the court below, applied to this court for leave to present the appeal in writing, and an order to that effect was made. A written abstract of 196 pages was filed, and it is so illegibly written as to be almost impossible to read, and the brief and argument of counsel were written by the same hand. The attorney-general, probably appreciating the difficulty in deciphering the record as presented by the appellant, has caused a complete abstract of the record to be presented, and, as this abstract is not denied, we are thus enabled to dispose of the case. Counsel for appellant makes some objection to rulings upon the introduction of the evidence. In some of these objections he does not cite us to that part of his abstract where the evidence is to be found, and when he does cite us to the page, no such evidence or ruling is to be found. His abstract is not indexed. Accepting the abstract prepared by the attorney-general as correct, we find no error in any ruling of the court made pending the introduction of the evidence.

II. There are numerous objections to the instructions of the court to the jury. With one single exception, these objections are utterly without merit, and we cannot take the time to notice them in detail. The exception referred to is this: The court instructed the jury as follows: "The defendant claims, and has offered testimony to prove, that he came into

1. PRACTICE
in supreme
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inal case:
appellant's
abstract
illegible:
cause review-
ed on ab-
stract of
attorney-gen-
eral.

2. LARCENY:
presumption
from posses-
sion of stolen
goods: evi-
dence to over-
come.

The State v. Peterson.

the possession of the goods in controversy in this case by finding them. If this be satisfactorily shown by the evidence, the defendant should be acquitted. It is only necessary for this explanation to be shown by a preponderance of the evidence, or to such extent as to leave it reasonably doubtful whether he acquired the possession by theft."

In the case of *State v. Richart*, 57 Iowa, 245, it was held that an instruction that the presumption arising from the possession of property recently stolen must be overcome by a preponderance of evidence was erroneous, and that case was followed in *State v. Hopkins*, 65 Iowa, 240. The true rule, as stated in those cases, is that it is sufficient to acquit if the evidence is such as to raise a reasonable doubt whether the defendant honestly came into the possession of the stolen goods. This instruction is unlike the instructions which were disapproved in the two cases above cited. It is true that in one clause it is stated that it is only necessary to explain the possession by a preponderance of the evidence, but this is immediately followed by what may be regarded as explanatory of what is meant by a preponderance of the evidence; that is, that it is sufficient to acquit if the evidence leaves it "reasonably doubtful whether he acquired the possession by theft." Taking the whole instruction together, we think it is in substantial accord with the rule announced by this court in the cited cases.

III. A claim is made that the district attorney was guilty of such misconduct in his argument to the jury as to demand a reversal of the judgment. We have not been able to find anything in the record upon this subject. It does not appear what the objectionable line of argument was. No mention is made of it in the motion for a new trial, and we find nothing but the assertion of appellant's counsel that the district attorney "hurled volley after volley of invective upon the head of Kate Virden," a witness in the case. We cannot accept

3. PRACTICE
on appeal:
errors must
be shown in
record.

the statement of counsel as true. His argument is no part of the record.

IV. An objection is made that the defendant was unlawfully tried because the court was illegally in session at the time of the trial. The facts upon which this complaint is based are that the judge of the court was not able to dispose of the business of the term before the commencement of the next term of his court in Marshall county. He made an order postponing and adjourning the term in Marshall county for one week, and he continued to hold court in Hardin county that week, during which the defendant was tried. It is very plain that the court was legally in session; it was but a continuation of the regular term.

We have passed upon everything in this record which appears to us to demand consideration, and our conclusion is that the judgment should be

AFFIRMED.

67	568
83	286
67	568
113	494

MCCLEAN V. THE CHICAGO, IOWA & DAKOTA R'Y CO.

1. **Railroads: DAMAGES FOR RIGHT OF WAY: EVIDENCE ON APPEAL FROM AWARD: OPINION OF OWNER AS TO USE OF PROPERTY.** Where the owner of land taken for railway purposes had testified to the value of the tract before and after the right of way had been appropriated, it was proper to allow him to show the basis of his estimate by testifying further that the property, before the appropriation, was adapted to residence purposes, but that it was not so adapted afterwards.
2. ———: ———: **ROAD-BED PARTLY IN STREET AND PARTLY ON PLAINTIFF'S LAND.** Where the bed of defendant's railway was partly on plaintiff's land, and partly on the city street adjacent to the land, plaintiff was entitled, in the proceeding to assess his damages, to be compensated, not only for the appropriation of the portion of his land taken for the right of way, but also for the injury he would sustain on account of the laying down of the railroad track in the street on which his property abutted—under Code, § 464.
3. ———: ———: **CONFLICTING EVIDENCE: VERDICT NOT DISTURBED.**

McClellan v. The Chicago, Iowa & Dakota R'y Co.

Since the evidence was conflicting as to the amount of plaintiff's damages, the verdict cannot be disturbed on appeal on the ground that the award was excessive.

4. **INSTRUCTIONS: REPETITION NOT NECESSARY.** It is not error to refuse to give instructions asked when the points thereof are fully covered by instructions given.

Appeal from Cerro Gordo Circuit Court.

SATURDAY, DECEMBER 12.

DEFENDANT instituted a proceeding for the condemnation of a right of way for its railway across certain lots in the town of Eldora, Hardin county, belonging to plaintiff. An appeal was taken from the award of damages made by the commissioners appointed by the sheriff. Afterwards a change of the place of trial was taken, and the case was sent to the circuit court of Cerro Gordo county. It was there tried to a jury, who assessed plaintiff's damages on account of the appropriation of said right of way at \$300. Defendant appeals.

John Porter and C. E. Albrook, for appellant.

Taylor & Evans, for appellee.

REED, J.—I. Plaintiff is the owner of a block of ground in Eldora, and defendant has appropriated a strip along one side, next to the street which bounds it on that side. The road-bed, as constructed, is partly on the street and partly on plaintiff's ground. The block is unimproved, and is situated in a part of the town which is not much improved. Plaintiff was examined as a witness in his own behalf, and was permitted, against defendant's objection, to testify that, before the appropriation by defendant of the right of way, the ground was well adapted to residence purposes, and that its adaptability to that use gave it its principal value, and that after defendant had appropriated the right of way it was no longer adapted to that use.

1. RAILROADS:
damages for
right of way;
evidence on
appeal from
award: opin-
ion of owner
as to use of
property.

The objection urged against the admission of this testimony was that it was not the statement of any fact known to the witness, but was the expression merely of the conclusion or opinion which he had formed from the facts. If the testimony had been offered for the purpose of affording a basis for an estimate by the jury of the damages which plaintiff sustained in consequence of the appropriation of the right of way, there might be force in the objection. But it was not offered for that purpose. The witness was examined with reference to the value of the property before and after the appropriation, and he expressed the opinion that its value before the appropriation was \$750, and that after the right of way was taken it was worth not more than \$50. The evidence was offered for the purpose of showing the ground of this opinion, and we think it was competent for that purpose. *Pelamoures v. Clark*, 9 Iowa, 1; *State v. Stickley*, 41 Id., 232.

II. The defendant asked the court to instruct the jury that plaintiff was not entitled to recover on account of the
2. —: —: occupancy by it of the street on which his prop-
road-bed partly in street and partly on plaintiff's land.
erty abutted, unless he was specially damaged thereby, and that the law affords him no remedy for such damages as he sustains in common with the members of the public generally on account of such occupancy of the street. The court added the following clause to the instruction, and with that modification gave it to the jury: "But if you should find that the occupation of the street by defendant for right of way purposes depreciated the value of plaintiff's property, then the depreciation of the value of the property from this cause would constitute such special or individual damage as to entitle him to recover the same." Defendant assigns the giving of this clause as error.

The town council had given defendant authority to occupy the street with its track. Under section 464 of the Code, the council has the power to authorize an appropriation of the street to such use. But the section further provides that no

railway track shall be laid on the street until after the injury which the abutting property will sustain has been ascertained and compensated in the manner provided by statute for taking private property for works of internal improvement. The condemnation proceedings were instituted by the railway company, and under this provision it is clear, we think, that plaintiff is entitled in this proceeding to be compensated in damages for the injury which he will sustain on account both of the laying down of the railroad track in the street on which his property abuts, and the appropriation of the portion of his land which has been taken for right of way purposes. Counsel for appellant do not deny this. Their position, however, is that the mere depreciation of the value of the property caused by the laying down of the track in the street is not an injury for which the statute affords a remedy; that such depreciation of value is occasioned by the construction of the road near the property, and the injury resulting therefrom is shared alike by all persons owning property in proximity to the road.

But this position is not sound. It is a well-known fact that the construction of a railway upon a street has, as a rule, a much more injurious effect on property abutting on the street than upon other adjacent property. It is to some extent a diversion of the street from its former use, and it necessarily interferes with the use and enjoyment of the property, and impairs its value. The owner of the abutting property sustains an injury from the appropriation of the street to such use which is quite distinct from that sustained by the owners of other adjacent property, and the object of the statute is to afford him a remedy for such injury. The instruction complained of limits plaintiff's right of recovery to such sum as will compensate him for the injury which he will sustain in the depreciation of the value of the property caused by the construction of the railroad in the street. We are clearly of the opinion that it is right.

III. Defendant insists that the damages awarded are

The Bank of Carroll v. Taylor.

excessive, and that a new trial should have been granted on 3. ---: ---: that ground. We deem it sufficient to say that conflicting evidence: there was a conflict in the evidence as to the verdict not disturbed. value of the property before and after the appropriation of the right of way, and that the award of the jury is sustained by the testimony of a number of witnesses. We cannot disturb the verdict on this ground.

IV. Complaint is also made of the action of the court in refusing to give certain instructions asked by defendant. But the points covered by these instructions are fully covered by those given by the court on its own motion.

AFFIRMED.

67 572
90 703
190 707
67 573
93 197
67 573
100 564
1100 568

THE BANK OF CARROLL V. TAYLOR.

1. **Promissory Note: COMBINED WITH CHATTEL MORTGAGE: NEGOTIABILITY.** Where a promissory note, negotiable in itself, was given in the purchase of a certain chattel, and coupled with the note, in the same instrument, was a mortgage upon the chattel to secure the note, and under the mortgage, as properly construed, (see next head note,) the mortgagee was entitled to take possession of the chattel whenever he might feel insecure, but not to sell it in payment, or part payment, of the note until after the maturity of the note, *held* that the instrument was negotiable, since the debt evidenced thereby was not subject to be diminished before its maturity. *Smith v. Marland*, 59 Iowa, 645, distinguished.
2. **Chattel Mortgage: RIGHT TO SEIZE AND SELL PROPERTY BEFORE MATURITY OF DEBT: TERMS CONSTRUED.** The chattel mortgage in question contained the following provision: "Whenever the holder hereof may deem himself insecure, then he may take said property (the mortgaged property) by virtue of this mortgage, and sell the same at public auction. * * * and the proceeds of said sale to be applied on said note," (the note secured by the mortgage); but preceding this provision was the following: "If this note and mortgage shall be paid on or before the maturity thereof, then this mortgage to be void." *Held* that, construing both provisions together, the mortgagee might *seize* the property whenever he felt himself insecure, but that he could not sell it till after the maturity of the debt.

Appeal from Guthrie Circuit Court.

SATURDAY, DECEMBER 12.

THIS action was brought by plaintiff on two instruments in writing, executed by defendant, by which he agreed to pay J. W. Stoddard, or bearer, different sums of money. Plaintiff alleges that it purchased said instruments for a valuable consideration, before maturity. Defendant answered, pleading a failure of the consideration of said instruments; but the averment in the petition that plaintiff is a purchaser of the instruments before maturity for value is not denied by the answer. Plaintiff demurred to the answer on the ground that the failure of the consideration of said instruments was not a defense against them in the hands of a purchaser for value before maturity. This demurrer was overruled, and, plaintiff electing to stand thereon, judgment was entered against it dismissing the petition, and for costs. Plaintiff appeals.

William H. Stiles, for appellant.

Arthur Spahr and Lymon Porter, for appellee.

REED, J.—The following is a copy of one of the instruments sued on: “\$40.00. COON RAPIDS, IOWA, 5, 4, 1881.

1. PROMIS-
SORY note:
combined
with chattel
mortgage:
negotiability.

On the twenty-fifth day of December, 1881, for value received, I promise to pay to J. W. Stoddard, or bearer, forty dollars, with interest at ten per cent, payable annually, from date until paid, and ten per cent is to be added to the amount if this note remains unpaid after maturity and is collected by suit. For the consideration mentioned above the undersigned hereby sells and conveys to J. W. Stoddard the following property: One Triumph Drill, No. —, upon condition, however, that if this note and mortgage shall be paid on or before the

The Bank of Carroll v. Taylor.

maturity thereof then this mortgage to be void, otherwise in full force; and it is further agreed that in case of failure to pay the amount due thereon at maturity, or whenever the holder hereof may deem himself insecure, then he may take said property by virtue of this mortgage, and sell the same at public auction, as by law provided: the proceeds of said sale, after deducting all expenses, to be applied on this note and mortgage, the residue, if any, to be returned to the undersigned." The only respect in which the other instrument differs from this is in the amount secured and the time of payment.

The question presented is whether these instruments are negotiable. Certainty as to the payor and payee, the amount to be paid and the time of payment is an essential quality of a negotiable promissory note. The first provision of the instruments in suit is an undertaking by the maker to pay to the person named as payee, or to bearer, a specified sum of money, with interest thereon at a certain date. This provision, standing alone, contains all the elements of negotiability. If the instruments are not negotiable, then it is because the undertaking of the maker is qualified, and some element of uncertainty in these respects is created by the subsequent provision. By this subsequent provision of the contract a mortgage of certain personal property for the security of the debt evidenced by the preceding provision is created. It does not, by any express terms, modify the undertaking of the maker in the preceding provision, either as to the amount which is to be paid, the time of payment, or the person to whom it is to be made. But it is contended that, as it confers upon the payee or the holder of the instrument the right to take possession of the mortgaged property, and (as is claimed) sell it, even before the maturity of the debt, and apply the proceeds in satisfaction thereof, it has the effect to render the instrument uncertain as to the amount which may be recovered upon it at maturity. It is claimed that the case, in that respect, is within the holding in *Smith v. Mar-*

land, 59 Iowa, 645. The instrument sued on in that case contained a provision that the title and right of possession to the personal property, for the price of which the note was given, should remain in the vendor (the payee of the note) until the debt should be paid, and that he, or any indorser of the note, might, at any time he deemed the debt insecure, declare the note due, and take possession of the property, and sell the same on five days' notice, and apply the proceeds in payment of the debt; and the holding of the case is that, as by this provision the debt evidenced by the instrument was liable to be diminished before its maturity by the amount for which the property should be sold, it was thereby rendered uncertain as to the amount which might be recovered upon it at maturity, and hence that it was not negotiable. If, by the provisions of the instruments in question, the mortgaged property might have been sold, and the proceeds applied in satisfaction of the debt before its maturity, it is possibly true that they would be governed by the same holding.

But whether this is true or not we need not determine, for, in our opinion, the mortgaged property could not, under the provisions of the instrument, be sold for the satisfaction of the debt until after its maturity. It is true that one provision of the instrument is "that, in case of failure to pay the amount due hereon at maturity, or whenever the holder hereof may deem himself insecure, then he may take said property by virtue of this mortgage, and sell the same at public auction, * * * and the proceeds of said sale to be applied on said note."

2. CHATTEL mortgage: right to seize and sell p. op-erty before maturity of debt: terms construed.

This provision, standing alone, would doubtless empower both the seizure and sale of the property before the maturity of the debt, and the application of the proceeds of such sale in satisfaction of the debt, if the holder considered himself insecure. But preceding this is the following condition, viz., "that if this note and mortgage shall be paid on or before the maturity thereof, then this mortgage to be void." This con-

Tuck v. The Singer Manuf'g Co.

dition clearly gives the mortgagor the right to discharge the property from the lien of the mortgage by paying the debt either at its maturity or before that. In determining the effect of the instruments, both conditions must be considered, and, when they are considered together, we think that, while they empowered the holder to take possession of the mortgaged property before the maturity of the debt if he deemed himself insecure, they did not empower him to sell it until after its maturity. For the mortgagor's equity of redemption did not expire until the maturity of the debt. The debt evidenced by the instruments was not subject to be diminished before its maturity, and there is no uncertainty as to the amount to be recovered thereon at maturity. The fact that, by these terms, a mortgage is created by which the debt is secured, and under which payment in whole or in part may be enforced after maturity, does not, in our opinion, affect the question whether or not the instruments are negotiable. They possess all the elements of negotiability. The judgment of the circuit court will be reversed, and the cause will be remanded.

REVERSED.

67	576
80	714

TUCK V. THE SINGER MANUF'G CO.

1. **Instructions:** AS TO IMMATERIAL DEFENSES: REFUSAL TO GIVE IS NOT ERROR: EXAMPLE. Refusing to give instructions with reference to immaterial questions, or matters which are pleaded by way of defense, but which do not constitute a defense in law, is not prejudicial to the party who seeks to raise the immaterial questions, or who has pleaded the incompetent matter, and is no ground for reversal. For illustration see opinion.
2. **Contract:** FOR COMMISSIONS OF SEWING-MACHINE AGENT: ABROGATION BY SUPPLEMENTARY CONTRACT: CONSTRUCTION: SEE OPINION FOR FACTS.
3. **Instructions:** SUBMITTING IRRELEVANT ISSUE WITHOUT EVIDENCE: ERROR WITHOUT PREJUDICE. Submitting to the jury a question on

Tuck v. The Singer Manuf'g Co.

which there was no evidence was error, but where the effect of such error was to require plaintiff to prove an allegation not necessary to his recovery, and the jury yet found for plaintiff, *held* that the error in giving the instruction was without prejudice to defendant, and was no ground for reversal.

Appeal from Woodbury District Court.

SATURDAY, DECEMBER 12.

PLAINTIFF brought this action to recover certain commissions which he alleges were due him on the sale of thirty sewing-machines, such sales being made under a written contract between the parties, whereby plaintiff was to receive a commission on each sale. There was a verdict and judgment for plaintiff. Defendant appeals.

Joy, Wright & Hudson, for appellant.

W. G. Clarke, for appellee.

REED, J.—On the seventh day of August, 1881, the parties executed a written contract, the material provisions of which are as follows: “The Singer Manufacturing Company, a corporation duly organized, party of the first part, and H. W. Tuck, party of the second part, enter into a contract as follows: (1) The party of the first part agrees to pay the party of the second part \$6 per week for his services in selling and leasing Singer sewing-machines. (2) That said first party agrees to pay to second party 15 per centum on all cash that may be realized during the continuance of this agreement from sales or leases made by said second party, which per centum shall be in consideration of all other services, aside from selling and leasing machines, which he may be called upon to render said first party. * * * (4) No per centum shall be paid on any time sales made at a discount of more than \$5 from retail cash price, or for any cash sales made at a discount of more than \$10 from retail

Tuck v. The Singer Manuf'g Co.

cash price, and no per centum shall be paid on any sale in which an old machine is taken in exchange at an allowance of more than \$10 on a time sale, or more than \$12 on a cash sale; said allowance to be made only on the full retail cash price-list for the new machine. * * * (8) It

is also agreed between the parties hereto that this agreement may be terminated at the pleasure of either party, and that the salary and per centum aforesaid shall both cease at the date of said termination: provided, however, that, if the said second party shall not enter into business either for himself or others in selling sewing-machines of any other manufacture, he shall receive, in consideration therefor, the aforesaid per centum on the net cash realized, after the termination of this agreement, on business done by him." The parties subsequently entered into the following supplementary agreement: "An agreement supplementary to an agreement made between said parties August 7, 1881. Concerning compensation to said second party, it is hereby agreed that the following shall take the place of the original agreement wherein it conflicts with it, and take the place of the original agreement wherein that is silent. (1) Party of the first part agrees to pay party of the second part \$6 per week for his services in selling and leasing Singer sewing-machines: provided, however, that said second party shall make one approved sale each week; and, if said second party shall make more than one approved sale any week, he shall receive \$8 for the service, instead of \$6, for each such week as he shall make two or more approved sales. (2) If said second party make more than one approved sale any week, he shall receive, on all cash realized on sales made by him during the continuance of this agreement, 15 per centum on the first and 20 per centum on the second sale, 25 per centum on the third, and 25 per centum on all sales made thereafter during such week in which he makes more than two approved sales.

* * *

Plaintiff continued in defendant's employment until the

twelfth of February, 1882, when the agreement was terminated by defendant. Plaintiff alleges that the contract was terminated by defendant without any fault on his part, and this allegation is denied by defendant in its answer. During the time he was in the employment, plaintiff made a number of time sales of machines, which were approved by defendant, but on which the cash had not been realized when the agreement was terminated. It is for commissions on these sales that defendant seeks to recover in this action. The evidence shows that defendant had realized the cash for the sales before the action was brought. It also shows that plaintiff, on more than one occasion, sold two of said machines in one week, and it tends to prove that nearly all of said sales were made at a discount of more than five dollars from the retail cash price of the machines. One of the defenses pleaded by defendant was that, under the contract, plaintiff was not entitled to any commission on time sales made at a discount of more than five dollars from the retail cash price. Another defense pleaded in the answer was that plaintiff, after the termination of the agreement, entered into the business of selling sewing-machines of another manufacture, and this allegation was proven on the trial. But there was no evidence on the question whether the contract was terminated because of the fault of plaintiff. In stating the issues to the jury, the court made no reference to the claim set up by defendant, that plaintiff's right to a commission on the sales was defeated by the fact that they were made at a discount of more than five dollars from the retail cash price of the machines. Nor was any express instruction given as to the effect which that fact (if it was proven) would have on plaintiff's right of recovery. The court, however, told the jury that, if the contract was terminated by defendant without any fault on the part of plaintiff, he was entitled to recover the commission provided for in the second paragraph of the supplementary agreement, on the time sales made by him on which defendant had realized the cash after the con-

tract was terminated, and that his right to recover such commission was not defeated by the fact of his engaging in the business of selling sewing-machines of another manufacture after the agreement was terminated. Counsel for appellant contend (1) that the court erred, in that it failed to instruct the jury at all with reference to one issue in the case; and (2) that the instructions given are erroneous.

I. That it is the duty of the trial court to properly instruct the jury with reference to all material issues arising under the pleadings is not doubted. This court has often held that the failure to so instruct is ground for reversal. But it is equally clear that the failure to give any instructions with reference to immaterial questions, or matters which are pleaded by way of defense, but which do not constitute a defense in law, is not prejudicial to the party who seeks to raise the immaterial questions, or who has pleaded the incompetent matter. The question, then, whether the district court should have instructed the jury as to the effect on plaintiff's right of recovery of the fact (if it was proven) that the sales in question were made at a discount of more than five dollars from the retail cash price, depends upon whether plaintiff's right of recovery would be defeated by it. If the fourth paragraph of the original contract was not modified or abrogated by the supplementary agreement, it is clear that the question made by the answer, with reference to the discount at which the machines were sold, is very material.

We think it clear, however, that this paragraph was superseded by the subsequent contract. It is a provision of the supplementary contract "that it should take the place of the original agreement wherein it conflicts with it." And the provisions of the second paragraph of this agreement are clearly in conflict with those of that paragraph of the original contract. By the latter, it is provided that no per centum shall be paid on any time sale made at a discount of more than five dollars from the cash retail price, while by the

1. INSTRUCTIONS: as to immaterial defenses: refusal to give is not error: example.

Tuck v. The Singer Manuf'g Co.

former it is provided that a per centum shall be paid on all cash realized from approved sales made by plaintiff during the continuance of the contract. By the one provision the right to the per centum is made to depend on the rate of discount from the retail price at which the sale is made, while by the other it depends upon whether the sale is approved by defendant. The conflict between the two paragraphs is apparent from this statement of their provisions. And the rights of the parties are to be determined with reference to the latter provision. The matter pleaded by the defendant did not, therefore, constitute a defense, and the court did not err in refusing to submit that question to the jury.

II. It is contended that the instructions given by the district court are erroneous because in conflict with the second and eighth paragraphs of the original contract. The second paragraph provides that plaintiff shall be paid a per centum on all cash realized during the continuance of the agreement from sales or leases made by him, and the eighth provides that the salary and per centum shall cease at the date of the termination of the contract. It also provides that if plaintiff shall not engage in the business of selling sewing-machines of other manufacture after the termination of the agreement, he shall be paid the per centum provided for in the contract on the net cash received, after the contract is terminated, on business done by him. The district court held that the second paragraph of the supplementary agreement took the place of these provisions. And we think this holding is correct. There is a conflict between the provisions of the two instruments which is apparent on the most casual reading of them. By the provisions of the second and eighth paragraphs of the original contract, plaintiff is entitled to a per centum on the moneys realized after the termination of the agreement only in case he shall not engage in the business of selling machines of other manu-

2. CONTRACT:
for commis-
sions of sew-
ing-machine
agent: abro-
gation by su-
plementary
contract: con-
struction:
see opinion
for facts.

Tuck v. The Singer Manuf'g Co.

facture, while paragraph two of the supplementary contract is an express undertaking by defendant to pay him a per centum on all cash realized by it on approved sales made by him during the existence of the contract. The only condition of his right to receive the per centum under this provision is that the sales shall have been approved by defendant. By the express provisions of the supplementary agreement, this paragraph takes the place of the two paragraphs of the original contract.

III. By the instructions given by the district court the jury were told that plaintiff was entitled to recover if the

S. INSTRUCTIONS: submitting irrelevant issue without evidence: error without prejudice.

contract was terminated without fault on his part. As stated above, there was no evidence as to the ground on which the agreement was terminated. The court erred, therefore, in submitting that question to the jury. But we will not reverse the judgment for an error committed by the trial court unless the appellant has been prejudiced by such error. And it is clear, we think, that defendant suffered no prejudice from the ruling in question. By the provisions of the second paragraph of the supplementary contract, which we hold took the place of the second and eighth paragraphs of the original agreements, plaintiff's right to the commissions depended alone on whether the sales made by him had been approved by defendant. The verdict of the jury establishes that they had been so approved. Indeed, there was no question as to that fact. Under the instructions he was required to prove, in addition to that, however, as a condition of his right to recover, that the contract was not terminated because of any fault of his. Under this instruction the jury should have found for the defendant, perhaps. But their verdict for plaintiff necessarily implies that they found every fact established which, under the law, he was required to establish in order to entitle him to a recovery. There is therefore no ground for setting aside their verdict. The error of the

The Knoxville Nat. Bank et al. v. Hanirick, Assignee.

court in submitting that question to the jury clearly affords defendant no ground of exception. We think the judgment is right, and it will be

AFFIRMED.

THE KNOXVILLE NAT. BANK ET AL. V. HANIRICK, ASSIGNEE.

67	588
605	663
67	583
127	249

1. **Assignment for Benefit of Creditors: QUESTIONS OF PRIORITY AMONG CREDITORS: JURISDICTION OF STATE AND FEDERAL COURTS.** Where an assignment for the benefit of creditors is pending in a state court, and there has been no distribution of assets, an original and independent action in equity may be brought in the same court, (*Wurtz v. Hart*, 13 Iowa, 515,) or in any other state court having equity jurisdiction, or in the federal courts, to determine the equities and priorities of the creditors among themselves, and the decree in such equitable action will be binding upon the court wherein the assignment is pending.
2. **Former Adjudication: BINDING UPON PRIVIES OF PARTIES.** A decree rendered against a mortgagee of chattels, to the effect that the mortgages are void, is binding upon the assignees of the mortgagee, though not parties to the action.

Appeal from Marion District Court.

SATURDAY, DECEMBER 12.

J. OPPENHEIMER made an assignment for the benefit of his creditors, and the appellants, having filed claims against the estate, asked an order directing the assignee to pay such claims. The relief asked was denied, and plaintiffs appeal.

Ayres Bros., for appellants.

J. Gamble, for appellee.

SEEVERS, J.—The material facts are that J. Oppenheimer executed his promissory notes, payable to the plaintiffs, and the same were signed by O. B. Ayres, as surety. At the same time the notes were executed Oppenheimer gave Ayres

The Knoxville Nat. Bank et al. v. Hanirick, Assignee.

chattel mortgages on a stock of goods, wares and merchandise, to indemnify him. The condition of the mortgages is that, if the notes which Ayres had signed as surety were paid, the mortgages were to be void. Afterwards, Oppenheimer assigned the mortgaged property to the defendant for the benefit of his creditors. The plaintiffs filed claims against the estate as provided by law. No objections were made thereto, and, ordinarily, the plaintiffs would have been entitled to a *pro rata* share of the assets in the hands of the assignee. The plaintiffs did not ask such an order, but did ask that their claims be paid in full, on the ground that Ayres had the prior lien on the assigned property under the mortgages, the benefit of which the plaintiffs claim. This order was insisted on by the appellee in a pleading filed by him, in which he pleaded that the validity of the mortgages had been adjudicated in an action in the circuit of the United States, to which Ayres was a party, and that they had been held invalid. To this pleading the plaintiffs demurred, on the ground that the federal court had no jurisdiction of the parties or subject-matter, and therefore the adjudication pleaded was void.

Simon Strauss & Co. were creditors of Oppenheimer at the time the assignment was made, and filed their claim with the assignee. No objection was made thereto. On the twenty-first day of April, 1882, Ayres filed a motion and asked the court to order the assignee to pay the full amount due the plaintiffs. On the same day, and as a defense thereto, it was pleaded that the mortgages given Ayres were fraudulent and void. Strauss & Co. intervened and asked that the pending question be transferred to the federal court, on the ground that they were non-residents of Iowa. On the twenty-first day of May, 1882, but after Ayres had made the applications above stated, Strauss & Co. commenced an action against the assignee, Ayres and others, in which they pleaded that the mortgages were fraudulent and void, and asked a removal thereof to the federal court. Afterwards, Strauss & Co. filed

The Knoxville Nat. Bank et al. v. Hanrick, Assignee.

a petition of intervention in the assignment proceeding. The object of these actions commenced by Strauss & Co. was to test the validity of the mortgages given to Ayres. Said actions were transferred to the federal court, and Ayres moved said court to remand the same to the state court, on the ground that the federal court "had no jurisdiction to try and decide the matters involved." This motion was overruled, and afterwards issues were joined in said several actions, and the circuit court of the United States held that the mortgages aforesaid were void, and the judgment of said court is in full force and effect. See 20 Fed. Rep., 553.

I. Counsel for the appellants contend that under and by virtue of the assignment the state court first obtained jurisdiction of the property or subject-matter of the several actions above referred to, and that such court had therefore the sole jurisdiction and power to determine the several equities of the various creditors who may have filed their claims with the assignee. It is further claimed that "when a state court has first obtained the custody and control of property, with power and authority to dispose of the same, the federal courts will not and cannot interfere." For the purposes of this case this last proposition will be conceded. The question, then, to be determined is whether, under the general assignment law, the district court did have such possession and control of the property as to deprive any other court of the power and jurisdiction under the statute to determine the equities or priority of liens of the creditors of the assignor on the property or fund in court. The general assignment law is contained in sections 2115 to 2128, inclusive, of the Code, and thereunder the assignee has the power, and it is his duty, to take possession of the assigned property, and he is subject to the order and direction of the court. Claims against the estate may be filed, and, if no creditor objects thereto within a specified time, "the court may order

1. ASSIGN-
MENT for
benefit of
creditors:
questions of
priority
among credi-
tors: juris-
diction of
state and fed-
eral courts.

The Knoxville Nat. Bank et al. v. Hanrick, Assignee.

and direct the assignee to make fair and equal dividends among the creditors of the assets in his hands."

It is probably true that the creditors could, by filing proper pleadings in the assignment proceeding prior to the distribution of the assets, have determined the equities and priorities between them, and that such adjudication would be final and conclusive. But there is nothing in the statute that requires this to be done. It may be that the correctness of the claims must be determined in the manner indicated by the statute. But it has been held that an original and independent action in equity may be brought in the same court in which the assignment is filed, for the purpose of determining equities and priorities of the creditors to the fund in court under the assignment. *Wurtz v. Hart*, 13 Iowa, 515. If such an action can be maintained, we see no reason why a similar action in any state court, other than the one in which the assignment is pending, cannot be maintained. The court in which the assignment is filed does not obtain the jurisdiction and power to determine the priorities between creditors under the general assignment law, but under the general powers and jurisdiction of the court. In this respect the statute relating to assignments is different from the recently repealed bankrupt statute of the United States. If the state courts have original jurisdiction, independent of the statute relating to assignments, it must follow that the federal courts have jurisdiction where one of the parties is a non-resident.

In this case no distribution had been made when Strauss & Co. intervened and commenced their action, and therefore *Perry v. Murray*, 55 Iowa, 416, is clearly distinguishable. We are of the opinion that, as between Strauss & Co. and Ayres, the federal court had jurisdiction, and that its judgments must be regarded between them as a final and conclusive adjudication that the mortgages under which Ayres claims are void.

II. It is, however, claimed that, if the foregoing proposition is correct, the plaintiffs are not bound by the judgment

The State v. Reno et al.

2. **FORMER adjudication:** of the federal court, because they were not parties to the actions and proceedings in such court. binding upon privies of parties.

From the statement of facts heretofore made, it will be observed that the plaintiffs claim priority under the Ayres mortgage. Through him they insist that their claims must be paid in full, if there are sufficient assets in the hands of the assignee. But, as the mortgages to Ayres have been held to be invalid, and as the plaintiffs claim through and not independent of him, it necessarily follows that the adjudication of the federal court is binding on and conclusive as such against them.

AFFIRMED.

67 587
110 340

THE STATE V. RENO ET AL.

1. **Criminal Law: CIRCUMSTANTIAL EVIDENCE: WHAT FACTS MAY BE PROVED BY.** When the state undertakes to establish the guilt of one accused of crime by circumstantial evidence, it is entitled to prove not only such circumstances as tend directly to show his guilt; but any competent evidence, though circumstantial, which tends to prove any material fact in the case, is admissible. For example see opinion.
2. **Instructions: REPETITION NOT REQUIRED.** Where the court gave the *substance* of an instruction asked, it was not error to refuse to give the instruction in the *form* in which it was asked.
3. **Larceny: PUNISHMENT NOT EXCESSIVE.** A sentence of five years in the penitentiary *held* not, under the circumstances of the case, (see opinion,) excessive for the larceny of two pairs of harness, a robe and one pair of fly-nets.

Appeal from Hardin District Court.

SATURDAY, DECEMBER 12.

THE defendants were convicted of the larceny of two pairs of harness and a robe, and one pair of fly-nets, and one celluloid ring, and were each sentenced to a term of imprisonment in the penitentiary, and from this judgment they appeal.

Huff & Pillsbury, for appellants.

A. J. Baker, Attorney-general, for the State.

REED, J.—The evidence introduced on the trial tends to prove that the property described in the indictment was stolen from the barn of the owner, in Iowa Falls, on the night of September 3, 1884. On the morning of the fourth the defendants left Iowa Falls in the way car of a freight train going north on the Burlington, Cedar Rapids & Northern Railway. This train was made up at Iowa Falls, and the way car had stood during the night on a side track at that place. At about twenty minutes after five o'clock in the morning the way car was run onto the main track near the platform, where it stood until the train started, which was at twenty-five minutes after six o'clock. While the car stood at the platform there was put aboard of it by some person two small valises and three large ones, but it is not shown by whom this was done. This baggage was not billed or consigned to any person. The defendants were ticketed from Iowa Falls to Livermore, and they were the only passengers on the car when it left Iowa Falls. The conductor and rear brakeman of the train, however, rode in the car, and, in addition to these, there was also another employe of the railroad company who worked on another division of the road. When the train arrived at Goldfield the defendants were arrested by an officer who lived at that place, and they and said valises were removed from the train. The railroad employe spoken of above left the train at Clarion, a station between Iowa Falls and Goldfield. When they were arrested the defendants admitted that the two small valises belonged to them. But denied that they had anything to do with the large ones. The stolen property, except the celluloid ring, was found in the large valises. Other articles were also found in them, among which were parts of a harness which did not belong to those stolen at Iowa Falls.

During the day after their arrest defendants were kept at a hotel in Goldfield. At one time during the day the officer permitted them to go to a water-closet in the rear of the hotel. Soon after they returned from there a man, who was then a resident of Goldfield, went to the same water-closet, and when he returned to the hotel he delivered to the officer who had the defendants in custody a celluloid ring, which the evidence tends strongly to prove is the same that was stolen with the harness. This man, however, died before the trial, and the circumstances under which he found the ring are not shown with certainty.

It is shown that the defendants were in Hampton, Franklin county, on the third of September, and that they then had in their possession certain harness which they procured an auctioneer to sell at public outcry on the street. One pair of these harness was not perfect, some of the parts being wanting; and the state claims that it was the missing portion of this harness which was found in the valises with the stolen property, and the evidence tends strongly to establish this claim.

I. It is urged by counsel for the defendants that the evidence with reference to the transaction at Hampton on the third of September is incompetent, and should have been excluded on their objection. They contend that, as that transaction had no connection with the larceny of the property at Iowa Falls, the evidence with reference to it has no tendency to connect the defendants with the commission of that offense. Their position, in effect, is that when the state undertakes to establish the guilt of one accused of crime by circumstantial evidence, it is entitled to prove only such circumstances as tend directly to show his guilt. But this view of the rule on the subject is entirely too narrow. Any competent evidence which tends to prove any material facts in the case is admissible. Any distinct fact which the state is required to establish may be proven by circumstantial evidence; for any cir-

1. CRIMINAL
law: circum-
stantial evi-
dence: what
facts may be
proved by.

cumstance which tends to establish such fact has necessarily some tendency to prove the charge. In this case, the effort of the state was to prove that the defendants had the stolen property in their possession. As tending to establish this fact, it proved that the valises containing the property was put on the car at the station at which they entered it, and that it was not consigned to any person, and that they were the only passengers who entered the car at that station. It cannot be denied that these facts had some tendency to prove that they are the persons who placed the valises on the car. Now, if it could be shown that, in addition to the stolen property, the valises contained portions of the harness which they had in their possession at Hampton on the day before, this would be an additional circumstance tending to connect them with said valises. While it is true, then, that the fact that they sold harness at Hampton on the third of September, standing alone, has no tendency to prove that they stole the property in question, the fact that the valises in which the stolen property was found also contained the missing portions of the harness which they sold there, does tend to prove that they are the persons who placed the valises on the train, and consequently that they had the stolen property in possession. It was on this theory that the evidence was admitted, and we think it is competent.

II. Counsel for the defendants asked the district court to instruct the jury that they would not be warranted in finding that defendants had the stolen property in their possession from the fact alone that it was found in the way car in which they were traveling. The court refused to give these instructions as written by counsel, but, on his own motion, told the jury substantially the same thing. The defendants were therefore not prejudiced by the refusal to give the instructions asked.

III. The district court sentenced the defendants each to be imprisoned in the penitentiary for the term of five years, and

2. INSTRUCTIONS:
repetition not
required.

Allen v. Bryson.

3. LARCENY:
punishment
not exces-
sive.

we are asked, if we cannot reverse the judgment, to reduce the punishment. The jury, we think, were fully justified by the evidence in finding the defendants guilty. There is nothing in the circumstances of the crime to recommend the guilty parties to the mercy of the court. It was a wanton invasion of the property rights of a citizen; and if the defendants are guilty, as we think they are, they have not been dealt with too harshly. We think the case is not one in which we would be justified in interfering with the judgment of the trial court.

AFFIRMED.

ALLEN V. BRYSON.

67	591
98	157
101	606
67	591
118	83

1. *abstract* **Practice in Supreme Court: EFFECT OF MERE DENIAL OF APPELLANT'S ABSTRACT, NO TRANSCRIPT BEING FILED.** Appellant's abstract in this case stated that it contained "all the evidence introduced, and all offers of evidence made, on the trial, together with all the objections made and exceptions taken by counsel, and all rulings of the court upon said trial, and the entire record in said cause," and the abstract on its face appeared to be what it claimed to be. Appellee filed an abstract stating that appellant's abstract was not correct; that it did not contain all the evidence in a condensed or other form; that it did not contain over one-third of the evidence taken on the trial, and that what it did contain was disconnected from the order in which it was introduced. But no transcript was filed from which this court could determine the questions thus raised. *Held* that under such circumstances appellant's abstract must be taken as true, and the cause reversed for errors appearing therein.
2. **Contract in Writing: BILL OF SALE: NOT VARIED BY CONTEMPORANEOUS PAROL AGREEMENT: EXAMPLE.** Where a defense was founded upon a bill of sale absolute upon its face, a reply which set up that there was a contemporaneous oral understanding that the transaction was to be regarded as a mere bailment of the property, for a temporary purpose, was properly held bad on demurrer. See opinion for cases followed and distinguished.
3. **Gift of Services: SUBSEQUENT AGREEMENT TO PAY: NO CONSIDERATION.** Where one person renders services for another gratuitously, and with no expectation of being paid therefor, no obligation is incurred by

 Allen v. Bryson.

the recipient which will support a subsequent promise to pay for the same.

4. **Settlement: PRESUMED FROM EXECUTION OF MORTGAGE.** The execution of a mortgage to secure an indebtedness, like the execution of a promissory note, (*Grimmell v. Warner*, 21 Iowa, 11,) raises a presumption that all matters between the parties up to that date have been settled.
5. **Evidence: VALUE OF ATTORNEY'S SERVICES: HYPOTHETICAL QUESTIONS.** Hypothetical questions to practicing attorneys as witnesses, to show the value of certain legal services, approved.
6. **Practice on Appeal: EVIDENCE NOT OBJECTED TO BELOW.** Objections to evidence cannot be raised for the first time on appeal to this court.

Appeal from Hardin District Court.

SATURDAY, DECEMBER 12.

BOTH parties are attorneys at law, and this action was brought to recover for professional services performed by the plaintiff for the defendant, and for personal property sold. Several defenses were pleaded, which are sufficiently referred to in the opinion. Trial by jury. Verdict and judgment for the plaintiff, and defendant appeals.

S. M. Weaver, for appellant.

W. V. Allen and *C. E. Albrook*, for appellee.

SEEVERS, J.—I. Preliminary to a consideration of the errors assigned, an objection to the abstract made by the appellee must be determined. The abstract states that "all the evidence introduced, and all offers of evidence made, on the trial, together with all the objections made and exceptions taken by counsel, and all rulings of the court upon said trial, and the entire record in said cause, is contained therein." In an abstract filed by appellee it is stated that appellant's abstract is not correct; that the evidence is not all contained in it in a condensed or other form; that it does not contain over

1. PRACTICE
in supreme
court: effect
of mere de-
nial of appel-
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stract, no
transcript
being filed.

Allen v. Bryson.

one-third of the evidence taken on the trial, and that what it does contain is disconnected from the order in which it was introduced. We understand that no transcript has been filed, and we are not advised that one was demanded by the appellee. We therefore cannot determine whether the abstract is correct or not. This being so, the appellee insists that many of the errors assigned cannot be considered. But we think, under the circumstances above stated, the correctness of the abstract must be assumed. On its face it appears to be full and complete, and when it so states we think the appellee must, in an abstract filed by him, state wherein the one filed by the appellant is incorrect. We are aware that this rule in some instances casts upon the appellee a burden not contemplated by the rules of this court, in cases where the appellant purposely or negligently has filed an incorrect abstract. Experience, however, teaches us that in a majority of cases in this court the correctness of the appellant's abstract is conceded, and in a large proportion of the remaining cases the corrections made therein by the appellee are easily made, and because of abundant caution. If we should hold that a simple denial of the correctness of the abstract has the effect to require us to examine the transcript, it is obvious that it would be made in every case. Because of the expense, the preparation and filing of the transcripts should not be encouraged. While this is so, the appellee, as a matter of right, may demand one, so as to enable him readily to ascertain whether the abstract is correct. Ordinarily this consideration is sufficiently strong to induce the appellant to prepare an abstract amply sufficient to enable the court to determine the questions discussed by counsel. Experience also teaches us that, in a majority of cases where the appellee files an abstract, it could have been omitted without detriment. If the appellant purposely or negligently prepares an insufficient or incorrect abstract, it is the fault of his attorney, and the court, if its attention is called thereto, would endeavor to

Allen v. Bryson.

inflict such punishment as to prevent a repetition. The objections made to the abstract must be overruled.

II. The defendant pleaded, as a defense, that in February, 1881, which was after at least some of the services for which the plaintiff seeks to recover had been performed, he and defendant had an accounting and settlement of and concerning all their mutual claims and demands, and it was then found and agreed that plaintiff was indebted to the defendant in the

2. CONTRACT
in writing:
bill of sale:
not varied by
contemporane-
ous parol
agreement:
example.

sum of \$300; that the defendant at said time loaned the plaintiff \$300, and thereupon the plaintiff executed to the defendant a bill of sale, which was made a part of the answer, of certain personal property. The bill of sale shows that in consideration of \$600 the plaintiff sold the defendant the personal property described therein. The plaintiff, in a reply, pleaded that the sole and only consideration for the so-called bill of sale was the sum of \$300 advanced to plaintiff by the defendant; and also that the property therein described "was placed" in the hands of the defendant, or included in the bill of sale, in pursuance of an "oral agreement of the parties thereto, for the sole and only purpose of allowing the defendant to use, manage and control the same during a temporary absence of the plaintiff from the state of Iowa;" and within six weeks thereafter the bill of sale was satisfied, and the property turned over to the plaintiff. To this reply the defendant demurred, on the ground that it sought to vary the terms of a written contract by parol. The demurrer was overruled. It should have been sustained. The general rule on this subject is well understood, and the only question is whether this case comes within it. The consideration stated in a written contract, it will be conceded for the purposes of this case, may be impeached and shown by parol to have failed in whole or in part, or to be illegal; but the reply goes much further than this, and states, in effect, that the bill of sale, which is absolute on its face, was in fact a mere bailment of the property for a temporary purpose, and it was pleaded

 Allen v. Bryson.

that the parties had thus limited the effect of the bill of sale by a contemporary oral agreement. To our minds, it is entirely clear that this cannot be done. *Martin v. Hamlin*, 18 Mich., 354; *Adams v. Wilson*, 12 Metc., 138; *Barker v. Buel*, 5 Cush., 519; *Peck v. Armstrong*, 38 Barb., 215; *Forbes v. Waller*, 25 N. Y., 430; *Hurd v. Gallaher*, 14 Iowa, 394; *Isett v. Lucas*, 17 Id., 503; *Gelpcke v. Blake*, 19 Id., 263; *Atherton v. Dearmond*, 33 Id., 353.

The appellee insists that the bill of sale, although absolute on its face, is in fact a mortgage, and that it was given for a temporary purpose which has been subserved, and that these matters can be established by parol. Conceding this may be done, it was not pleaded that the bill of sale was a mortgage. That a writing should be read and construed in the light of the surrounding circumstances is undoubtedly true; (*Singer Sewing Machine Co. v. Holcomb*, 40 Iowa, 33;) but no words having a different meaning from those used can be added thereto. Under the pleadings, the instrument in question must be regarded as a bill of sale. The reply recognizes it to be such, and no words can be interpolated therein which have the effect to change or alter the meaning of the words there used.

III. The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward, by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover

3. GIFT of services: subsequent agreement to pay: no consideration.

Allen v. Bryson.

unless, after such services were rendered, and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being paid therefor, a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay, and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which, because of the lapse of time, or for other reasons, cannot be enforced, the moral obligation is sufficient to support a subsequent promise, will be conceded.

These cases are distinguishable, because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed: *Cook v. Bradley*, 7 Conn., 57; *Williams v. Hathaway*, 19 Pick., 387; *Dawson v. Dawson*, 12 Iowa, 512; *McCarty v. Hampton Building Ass'n*, 61 Id., 287.

IV. The defendant asked the court to instruct the jury that, if they found that the plaintiff gave the bill of sale to

Allen v. Bryson.

4. SETTLEMENT: presumed from execution of mortgage. secure an actual or nominal indebtedness, it will be presumed that a settlement was made between them as of that date, and that all their mutual claims were merged therein. This instruction was asked on the theory claimed by the plaintiff that the bill of sale was a mortgage given to secure the payment of money. The execution of a promissory note raises a presumption that all matters between the parties up to that date have been settled. *Grimmel v. Warner*, 21 Iowa, 11. The execution of a mortgage to secure an indebtedness must, it seems to us, have the same effect. The instruction asked should have been given.

V. The plaintiff introduced as witnesses three practicing attorneys, for the purpose of establishing the value of his services. Hypothetical questions were asked them, to which the objection was made that they were immaterial and incompetent, and that the witnesses did not show sufficient knowledge of the case to enable them to answer, and that the questions did not conform to the facts proved. We think the evidence was material and competent, and that the witnesses were qualified. In the main, the hypothetical case put in the questions was in accord with the evidence, or with what it tended to prove, unless, possibly, the amount in controversy in some of the cases was not stated with entire accuracy. It is now urged that the witnesses were asked to state the value of the services

5. EVIDENCE: value of attorney's services: hypothetical questions. based upon the fact that the suits were successfully gained or defended, and that one of the actions was stated to be on a new sewing-machine bond, and the number of pages contained in a petition for rehearing made in this court. It is sufficient to say that no such objections as these were made in the district court, and therefore they cannot be urged for the first time here.

6. PRACTICE on appeal: evidence not objected to below.

It is insisted that the court erred in other respects, but some of the objections are not well taken; others are not of a vital character. We deem it unnecessary to take the time to more particularly refer to them.

REVERSED.

HUFF V. OLMSTEAD.

87 598
88 279

1. **Vendor and Vendee: VENDOR'S LIEN: FACTS TO SUSTAIN.** Plaintiff conveyed the land to defendant in consideration of a cash payment, and a promise of defendant to execute a mortgage back on the land to secure the payment of the balance of the purchase money, unless he should sooner convey to plaintiff a good title to certain other lands in payment of the balance. Defendant did not convey the other lands, but he executed a mortgage and had it placed on record, differing in its terms, however, from the one agreed on; but plaintiff did not accept the mortgage. *Held* that plaintiff had a vendor's lien on the land conveyed to defendant, which was properly enforced in this action.
2. **Appeal: NO RELIEF FOR APPELLER.** One who does not appeal cannot have a modification in this court of the judgment appealed from.

Appeal from Warren District Court.

MONDAY, DECEMBER 14.

ACTION in chancery to enforce a vendor's lien. There was a decree in the district court granting the relief prayed for in the petition. Defendant appeals.

Parsons & Perry, for appellant.

Bryan & Bryan, for appellee.

BECK, CH. J.—I. The pleadings and evidence show the following facts as we find them in the record: Plaintiff conveyed to defendant the lands upon which the lien

1. **VENDOR and vendee: vendor's lien: facts to sustain.** is claimed in this suit, and was to receive in part payment therefor certain lands in Nebraska, which were to be taken by plaintiff as payment of \$1,500. The balance of the purchase price of the land sold by the plaintiff was to be paid in cash. Before the land was conveyed to defendant he discovered that there was a defect in his title to the Nebraska lands. But it was agreed by the parties that defendant should pay the money consideration in a manner

Huff v. Olmstead.

agreed upon; that defendant should convey to plaintiff the lands conveyed to defendant to secure the sum remaining unpaid, \$1,500, within three months, unless within that time defendant should convey a good title to plaintiff of the Nebraska lands. The defendant failed to execute a mortgage in compliance with the agreement of the parties, but he did execute a mortgage which extended the time of payment of the \$1,500 about seven months, and made no provision for interest, and sent it himself to the proper office for record. This mortgage the plaintiff refused to accept, or to regard as a compliance with the agreement, and so informed defendant, and he brings this action to enforce his vendor's lien for the amount of the purchase money remaining unpaid.

These are the facts, as we find them from the evidence, upon which the case is to be determined. Many other facts are disclosed in the evidence and recited in the arguments of the respective counsel, which are not in dispute, and are collateral and unimportant in the determination of the case.

II. Upon some of the controlling facts found by us, especially the agreement as to the time for payment of the \$1,500, or conveyance of the Nebraska lands, there is a conflict in the evidence; but the strong preponderance of proof supports our conclusion. We are not accustomed to discuss conflicting evidence and point out the grounds for our conclusions in cases of this character.

III. There are no questions of law in this case demanding discussion. The defendant's counsel claim that, as there was no debt payable in money, and a mortgage was given, the vendor has no lien on the land. But the debt was payable in money; it was provided, however, that it could be paid by the conveyance of the Nebraska lands by defendant within a time prescribed by the agreement. This condition was not complied with, and the debt continued to be a money claim. The mortgage executed by defendant was not in accord with the agreement of the parties, and was not

Halstead v. Cuppy.

accepted by plaintiff. It cannot be regarded in this action as a mortgage security for the debt.

IV. The plaintiff insists that the decree is erroneous in that it does not provide for interest. But as he did not appeal from the decree, he cannot complain of it in this court.

A motion of plaintiff need not be considered. We reach the conclusion that the decree of the court below ought to be

AFFIRMED.

HALSTEAD V. CUPPY.

1. **Evidence:** ACTION ON BOOK ACCOUNT: COPY. Since a book account cannot be proved by a copy taken from the book, it was error to allow plaintiff to testify that the exhibit attached to his petition was a correct copy of the account as it was kept at the time it accrued.

Appeal from Pottawattamie Circuit Court.

MONDAY, DECEMBER 14.

THIS is an action on account for labor performed by plaintiff for defendant, for merchandise furnished him, and for money paid out for his use and benefit. There was a verdict and judgment for plaintiff. Defendant appeals.

E. A. Babcock, for appellant.

Dailey & Smith, for appellee.

REED, J.—Plaintiff alleges in his petition that between August 12 and December 1, 1881, he furnished to defendant goods, wares and money, to the aggregate amount of \$2,155.63, and that there had been paid him on said account at various times sums aggregating \$1,938.62. Attached to

Halstead v. Cuppy.

the petition as an exhibit was a statement of the account. The items of debit set out in the account numbered something over 100, and it contains fourteen items of credit. The defendant admitted that the sums of money for which credit was given in the exhibit had been paid to plaintiff, but denied the items of indebtedness set out therein. On the trial plaintiff was examined as a witness in his own behalf, and was asked by his counsel whether the exhibit attached to his petition was a correct copy of his account against defendant. He answered that it was a correct copy of the account as it was kept at the time he was doing the work and furnishing the merchandise and paying out the money for which he sought to recover. Defendant objected to the question and answer on the ground that they were incompetent, but the objection was overruled.

In our opinion the objection should have been sustained. The evidence was offered for the purpose of laying the foundation for the introduction in evidence of the exhibit. But the exhibit was not competent evidence to prove the items of the account. It was but a copy of the account as it was kept in plaintiff's books of account at the time of the transactions to which the items relate. The books themselves may have been admissible, but they were not introduced or offered in evidence, and it is well settled that a mere copy of the books is not admissible to prove the account. *Churchill v. Fulliam*, 8 Iowa, 45; *Peck v. Parchen*, 52 Iowa, 46.

For the error in admitting this evidence the judgment will be reversed and the cause remanded.

REVERSED.

67	602
79	554
67	602
131	634

TRULOCK V. BENTLEY ET AL.

1. Tax Sale and Deed: DEFECTIVE PROOF OF SERVICE OF NOTICE TO REDEEM: PROOF AND DEED NOT VOID: STATUTE OF LIMITATIONS.

Where notice of the expiration of the time of redemption from a tax sale was duly given, but the proof of the service of the notice, though made by the proper party, was defective only in not stating some of the facts required by the statute, *held* that the proof of service and the deed issued thereon were not void, but were sufficient, after the lapse of five years, to enable the holder of the deed successfully to plead the statute of limitations (Code, § 902) against the holder of the patent title in an action to recover the land.

REED and ADAMS J. J., *dissenting*.

Appeal from Ringgold Circuit Court.

MONDAY, DECEMBER 11.

ACTION TO RECOVER LANDS. After the answer of the defendants was filed, pleading equitable defenses, and praying that their title to the land be quieted, the cause was transferred to the chancery docket, and, upon a trial on the merits, a decree was rendered granting the relief prayed for by defendants. Plaintiff appeals.

J. W. Brockett, for appellant.

Henry & Spence, for appellees.

BECK, CH. J.—I. The action involves the validity of a tax deed, and the rights of defendant to plead the statute of limitations (Code, § 902) to the action. The plaintiff claims and shows title by a regular chain of conveyances from the patentee. The defendants' title is based upon a tax sale and deed made after plaintiff had acquired the patent title.

II. Plaintiff insists that the tax title is invalid, for the reason that the record fails to show sufficient proof, required

by the statute, of the service of notice of the expiration of the time for redemption prescribed by Code, § 894. The defendants insist that the notice, and the proofs of service thereof, are sufficient; but, if this be not so, that the action is barred by Code, § 902, which provides that "no action for the recovery of real property, sold for non-payment of taxes, shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded" as provided by the statute.

III. It may be conceded, for the purpose of the case, that the proof of the service of notice is not in accord with the requirements of the statute, as construed by this court. But there was an attempt to comply with the statute, by the presentation of the affidavit of a publisher of the newspaper wherein the notice was printed, and a supplemental affidavit of the agent of the holder of the tax-sale certificate, which, however, is deficient in not showing the manner and time of the publication of the notice, and other matters.

IV. The question before us for determination is this: When there has been a notice of the expiration of the time for redemption published, but the proof of publication does not conform to the requirements of the statute, may the holder of the tax title invoke the limitation prescribed by Code, § 902? It may be conceded, for the purpose of the case, that if there were no notice of redemption published, or no proof of publication made, the bar of this statute could not be pleaded. And it may also be admitted, in the same manner, that if publication and proof thereof are made in such manner that they will be regarded by the law as void, as having no effect in law and no existence, the limitation could not be invoked. We think that the proof in question in this case cannot be regarded as void in this sense of the word. The proof of the holder of the certificate was made by the person authorized by law, and it is defective only in that it does not state facts required by the statute. Here was an act attempted by a person duly authorized to perform it. The

Trulock v. Bentley et al.

performance was defective, but capable of being helped or cured by amendment. There was no want of authority or power of the holder of the certificate to make the proof. He simply exercised his power and authority in a defective manner. This act, therefore, cannot be regarded as void in the sense in which the word is used when applied to acts done without authority. It was an act defectively done. It was regarded as sufficient by the treasurer. Nor can it be said that the tax deed is void in the same sense. We think the law will never regard acts defectively done, in the exercise of lawful authority, as void in such sense. When authority exists to do the act, its defective performance may deprive it of effect, but it will not be regarded as never having been done. And when its defects are cured by amendment, or by the lapse of time, the law will protect rights based thereon. It must be remembered that the defect complained of consists, not of a jurisdictional act omitted or defectively done, but of defective proof of such act. It is not the case of omission of service of notice, or defective service, but simply of defective proof of service. The record shows that a service was given as required by law. The defect is not the want of an essential jurisdictional act, but consists of informal proof of such an act. Surely time and the statute of limitations ought to afford the means of curing such a defect. The object of the statute of limitations above referred to was doubtless to protect the rights of parties against errors and irregularities of this character. If it may be invoked only when they do not exist, it would add nothing to the security of titles based upon tax deeds; for if there should be no irregularity or error, there would be no need of the statute, and if it does not protect the title holder against them, then it is a vain thing. These views are not in conflict with prior rulings of this court. See *Adams v. Griffin*, 66 Iowa, 125. The decree of the circuit court is in accord with these views. It is therefore

AFFIRMED.

Trulock v. Bentley et al.

REED, J., *dissenting*.—It appears to me that the conclusion reached by the majority is illogical and unreasonable. The notice to redeem from the tax sale embraced more than twenty-five tracts of lands, and was directed to the same number of persons. We held, in *White v. Smith*, 25 N. W. Rep., 115,* that such a notice was insufficient, and that the right of redemption was not extinguished by a deed based thereon. The service of the notice was proven by the affidavit of the publisher of the newspaper in which it was published. It was held in *American Missionary Ass'n v. Smith*, 59 Iowa, 704, that such proof was insufficient, and that the right of redemption from the tax sale was not cut off by it. There exist two grounds, then, upon which it has been held by this court that there was a total want of power in the treasurer to execute the deed. But the holding of the majority is that, notwithstanding the fact that the deed was executed without right or authority, and notwithstanding the further fact that plaintiff's right of redemption has never been extinguished, his right of action is barred. This conclusion seems to me to be unsound. The statute should be liberally construed, and the limitation created by it should be held to apply as against all merely technical irregularities in the proceeding. But until a deed has been executed, under an actual power to execute it, I think it impossible that the period of limitation should begin to run. In my opinion the judgment ought to be

REVERSED.

ADAMS, J., concurs in this dissent.

*Opinion reserved on rehearing, and hence not yet published in official reports.—REPORTER.

67	606
81	606
67	606
114	283
67	606
117	24
67	606
128	590

CARSON, PIRIE, SCOTT & CO. V. BYERS & EGGERS ET AL.

- Partnership: LOAN OF MONEY ON OBLIGATION OF INDIVIDUAL PARTNERS: FIRM LIABILITY.** Where money was borrowed for partnership purposes, but the notes and mortgage upon the firm property, given to secure the loan, were not executed in the firm name, but were signed by all the partners individually, *held* that the debt was a debt of the firm, and that the mortgage could not, on account of being so executed, be set aside at the instance of subsequent creditors of the firm.
- Mortgage: TO SECURE SUM GREATER THAN DUE: BADGE OF FRAUD: EVIDENCE TO OVERCOME.** When a mortgage is taken for more than is due from a person known to be insolvent, it is incumbent on the mortgagee to show that the mortgage was made in good faith and for honest purposes, and to satisfactorily show why an amount greater than the actual indebtedness was secured by the mortgage; (*Lombard v. Dows*, 66 Iowa, 243;) but in this case it appears that the mortgagee did not know that the mortgagors were insolvent, or approaching insolvency, and the evidence (see opinion) otherwise sufficiently overcomes the presumption of fraud arising from the excess of the amount secured.
- Fraud: OBTAINING PREFERENCE IS NOT.** A creditor has a right to secure his debt in good faith, even if he knows that his debtor has other creditors who will by his act be hindered in the collection of their claims.
- Assignment for Benefit of Creditors: WHAT IS NOT.** A chattel mortgage made by partners, which does not include all the firm property, and which is not intended by any of the parties to operate as an assignment for the benefit of creditors, cannot be construed as an assignment.

Appeal from Shelby District Court.

MONDAY, DECEMBER 14.

THIS is a controversy involving the rights of the parties to the proceeds of the sale of a stock of goods of an insolvent mercantile partnership. The parties claiming said proceeds are P. K. Watters and Louisa Watters, mortgagees of the goods, upon one side, and a number of the general creditors of the firm, who claim that the mortgage is fraudulent and void as to them. The cause was tried as an action in equity,

and there was a decree against the mortgagees, and they appeal.

Smith & Cullison and George Getty, for appellants.

Sapp & Pusey, for appellees.

ROTHROCK, J.—I. Some time previous to the month of September, 1882, H. W. Byers and Paul Eggers commenced negotiations with a view to forming a partnership in keeping a country store. They at one time contemplated locating at Harlan, Shelby county. Some time before September 1, 1882, they concluded to open a store at Earling. They were both without means, excepting that Byers was possessed of a small amount of money, not exceeding \$800 in all. They applied to a sister of Eggers for a loan to enable them to start in business. Preparations were made for embarking in the enterprise by commencing the erection of a store building. Eggers' sister loaned them \$2,000. The money was delivered to Eggers in the form of a draft on Chicago. The same day the partners met in Harlan, and ordered a bill of goods of a traveling salesman for a Council Bluffs wholesale house. This was on Friday. On the Monday following they went to Chicago to purchase a stock of goods. They bought goods of the value of some \$3,500, partly for cash and partly on credit. On their return from Chicago they executed a promissory note to the sister of Eggers for the \$2,000, due in five years, with interest at ten per cent per annum, and they then went to Earling and opened up their business in the name of Byers & Eggers. In February, 1883, H. W. Byers sold his interest in the partnership to his brother, E. C. Byers, for \$2,000, and E. C. Byers assumed the firm indebtedness. In the meantime the sister of Eggers married P. K. Watters, and turned over to him the management of all her business in his name. In March, 1883, E. C. Byers and Eggers borrowed of Watters an additional sum of \$500,

and executed to him their note for that sum, and also one for \$2,500, and gave him a chattel mortgage securing the payment of the notes. This mortgage was not acknowledged nor recorded. On May 1, 1883, Watters went to Earling with an attorney, and learned that F. K. Byers, wife of E. C. Byers, was a member of the partnership, and new notes and a new mortgage were then taken for the same amounts as in the first mortgage, due one day after date, and signed by all the members of the firm, and the old notes and mortgage were surrendered. The last mortgage was recorded on the second day of September, and on the same day it was placed in the hands of the sheriff for foreclosure, who took possession of the goods under the mortgage. At this time the partnership was owing some \$3,000 or \$3,500 to wholesale merchants in Chicago and elsewhere. Carson, Pirie, Scott & Co., commenced an action on one of these claims, and garnished Watters and the person in possession of the stock of goods. Other creditors intervened, and garnished the mortgagee and the sheriff. The garnishee Watters answered, setting up his mortgage, and denying any indebtedness to the partnership. The general creditors controverted the answer of the garnishee, and the action was tried upon these issues. Upon motion of the plaintiffs the cause was transferred to the equity calendar and tried as an action in chancery.

This motion was resisted by the garnishees, and the ruling of the court thereon is the first question presented by counsel for appellants. Counsel for appellees claim that this ruling cannot be reviewed, because no errors are assigned, and that, as the cause was tried in the court below on its merits, it must be so tried here. In the case of *Powers v. County of O'Brien*, 54 Iowa, 501, it was held that when a party in an equity case stands upon the ruling on a motion or demurrer, and appeals therefrom, errors should be assigned. Whether the rule in that case is applicable to the case at bar we need not determine, because the conclusion we have reached in this case renders the question immaterial to either of the parties;

and, as the case has already been twice tried in the court below, once to a jury and again by the court, it is preferable that it be determined here on its merits.

II. As has already been stated, the note given by H. W. Byers and Paul Eggers to the sister of Eggers was for \$2,000.

1. PARTNER-
SHIP: loan of
money on
obligation of
individual
partners: firm
liability. The money for which the note was given constituted nearly the whole of the means of the firm with which to commence their business. That it was so used is not questioned. Counsel for the partnership creditors claim that, although Byers signed the note given for the \$2,000, yet it was in fact the individual debt of Eggers. This claim finds but very little support from the evidence. The very great preponderance of the evidence is to the effect that the debt was the joint debt of both members of the partnership, and when the additional loan of \$500 was made, and the mortgage given to secure that and the previous indebtedness, the notes and mortgage were executed by all of the members of the firm, as Watters, the payee and mortgagee, then supposed; and when the last notes and mortgage were given, all the members of the partnership joined in their execution. After a careful examination of the evidence, we have no doubt that the money for which the mortgage was given was a partnership debt. The fact that the mortgages and notes were not executed in the partnership name, is of but a small consequence in determining the rights of the parties. In *Berkshire Woolen Co. v. Juillard*, 75 N. Y., 535, it is said: "But when the property is not only obtained for and applied to the benefit of the firm, but it is so obtained by the joint act and upon the joint written obligation of all its members, and the credit is given to all, the transaction is in substance a co-partnership transaction, though the firm name is not actually used in the writing, and though the partners have superadded to their joint obligation the several liability of each of them." This disposes of any alleged equitable claim set up by the partnership creditors as against the claim of Watters, the mortgagee; and

it will be understood that we do not pass upon the question whether the mortgage to Watters would be void as to the firm creditors, even if it had been given for the individual debt of one of the partners. Upon this question, see *City of Maquoketa v. Willey*, 35 Iowa, 323.

III. It is claimed by counsel for appellee that the mortgage upon which the goods were seized and disposed of is fraudulent as to the other creditors of the partnership. It is claimed that it is void because it was made with the intent to hinder, delay and defraud the other creditors. We do not think this proposition is sustained by the evidence. It is true that both mortgages were taken for more than was due; and, when a mortgage is taken for more than is due from a person known to be insolvent, it is incumbent on the mortgagee to show that the mortgage was executed in good faith, and for honest purposes, and to satisfactorily explain why an amount greater than the actual indebtedness was secured by the mortgage. *Lombard v. Dows*, 66 Iowa, 243. We think the mortgagee in this case has made such showing. When the first mortgage was taken its amount was nearly \$500 in excess of the actual indebtedness. The evidence shows that at that time Watters did not know that Byers & Eggers contemplated insolvency, or that they would be unable to continue in business and prosper. They represented to him that they were in need of \$500, which he let them have; and, in view of the fact that they might need further assistance, the mortgage was made somewhat greater than the debt, so that Watters could furnish them the additional sum without the necessity of giving further security. It does not appear that Watters then had any knowledge that Byers & Eggers intended, by giving the mortgage, to hinder, delay, or defraud their creditors. When the last mortgage was taken, the same amount was named therein as in the first mortgage. Some interest had accrued on the debt, and the excess over the true indebtedness was \$360. Now, it appears from a pre-

2. MORTGAGE:
to secure sum
greater than
due: badge of
fraud: evi-
dence to over-
come.

ponderance of the evidence that this excess was included in the last mortgage by mere oversight. There was no fraudulent purpose or intention upon the part of any of the parties thereto, so far as the amount of the mortgage was concerned. Watters was intent only on securing the indebtedness actually due to him, and had no purpose to aid the partnership in any way to prejudice other creditors. There was no collusion between Watters and Byers & Eggers. The record shows very clearly that Eggers knew nothing about the business of the firm. He had no design to cheat or defraud any one. He appears to have been entirely under the management and control, first of H. W. Byers, his first partner, and afterwards of E. C. Byers, his last partner. So far as the intention of E. C. Byers in giving the mortgage is involved, he acted without any collusion with Watters. On the contrary, he gave the mortgage reluctantly, and only because Watters persistently demanded it. We are satisfied from the evidence that the mortgage was not fraudulent as to the other creditors of the firm. A creditor has the right to secure his

3. FRAUD: ob- debt in good faith, even if he knows that his
taining pre- debtor has other creditors, and knows that the
ference is not. effect will be to prevent other creditors from collecting their
claims.

It is urged by counsel for appellees that the mortgage operated as a general assignment for the benefit of creditors, which preferred one creditor to another, and that
4. ASSIGN- it is void under section 2115 of the Code. We
MENT for benefit of
creditors: what is not. do not think this position is sound. It did not
operate as a general assignment, because it did not include
all of the property of the firm, and none of the parties
intended at the time that the mortgage was made that it
should be operative as an assignment. For aught that
appears, it was supposed at the time that the store would be
carried on as before.

Our conclusion is that there should have been a decree dismissing the action and the petition of intervention as to the garnishees.

REVERSED.

WHEELER V. KIRKENDALL.

1. **Execution Sale of Land: RIGHTS OF TENANT END WITH DEED TO PURCHASER: CODE, § 3625, NOT APPLICABLE.** A tenant in possession of land sold on execution, under lease from the execution defendant, can have no higher or better rights than his lessor, and he is charged with notice of the sale, and of the expiration of the time for redemption; and, if he sows a crop which he cannot reap within that time, it is his own folly, and he cannot hold the land for the purpose of reaping his crop, under § 3265 of the Code, which does not apply to such a case. (Compare *Downard v. Groff*, 40 Iowa, 597, and *Martin v. Knapp*, 57 Id., 336.)

Appeal from the Superior Court of Council Bluffs.

MONDAY, DECEMBER 14.

ACTION at law to recover the possession of real estate. Trial to the court. Judgment for the plaintiff, and defendant appeals.

Wright, Baldwin & Haldane, for appellant.

A. J. Hart and G. A. Holmes, for appellee.

SEEVERS, J.—The court found that the plaintiff was the owner of the real estate in controversy; that he obtained such title “by purchase at a special execution sale of said property against the owner, C. C. Clemins; that said sale was on the twelfth day of May, 1884, and the right to redeem expired on the twelfth day of May, 1885; that the said Clemins failed to redeem, * * * and plaintiff procured his deed on the thirteenth day of May, 1885, and on the fourteenth day of May, 1885, notified the defendant that he demanded possession, which was refused; that the defendant claims to have a right of possession by virtue of the written lease executed to him, December 9, 1884, by Clemins; “that at the time of the service of said notice defendant was in the act of plowing, sowing and planting the real estate to crops,” and continued so to do. The court, as a conclusion

Wheeler v. Kirkendall.

of law, found that the plaintiff was entitled to the immediate possession of the real estate, and judgment was rendered accordingly.

It is insisted by the appellant that the judgment is erroneous because it does not provide that the defendant might continue in possession of the premises as provided in Code, § 3265, which provides that if the defendant aver that he has a crop sowed, planted or growing on the premises, then the jury or court is required to make certain findings, and then, upon the execution of a bond, possession of the premises may be retained until the first day of January next succeeding the trial. The plaintiff could have instituted an action for forcible entry and detainer before a justice of the peace, and, under the facts found by the court, he could have recovered. Code, § 3611. In such an action the defendant would not have been entitled to retain possession until he had gathered his crops, for the reason that he knew, or was bound to know, that the title to the real estate might vest in some one else than his lessor prior to the time his crops could be harvested. His right in this respect was no better than his lessor. For this reason we do not think the section above referred to contemplates this kind of a case, but one where a person is in possession of real estate as owner or tenant, who in good faith plants or sows, with the belief that he can reap before another person is entitled to and can lawfully demand possession of the premises. The defendant was bound to know the extent of his lessor's right and title. The statute, in our judgment, does not contemplate a case where one plants a crop knowing at the time that his right to possession will expire before it can be harvested, or is matured and ready to be harvested, as was held in *Hecht v. Dettman*, 56 Iowa, 679. In addition to what has been said, it seems to us that the question in this case must be regarded as having been settled against appellant by the adjudications of this court. *Downard v. Groff*, 40 Iowa, 597; *Martin v. Knapp*, 57 Id., 336.

AFFIRMED.

BRADLEY V. JOHNSON ET AL.

1. **Assignment of Errors: NOT SUFFICIENTLY SPECIFIC.** Where each of two defendants separately demurred to the petition, and the demurrers were sustained, and the appellant assigned as error "the ruling of the court in sustaining the several demurrers of the defendants," naming them, *held* that the assignment was not sufficiently specific under § 8207 of the Code.

Appeal from Plymouth Circuit Court.

MONDAY, DECEMBER 14.

THE defendants are husband and wife. The plaintiff seeks by this action to charge the property of the wife with the purchase price of certain lumber used in the construction of a dwelling-house for the defendants, upon the ground that the lumber was a necessary family expense. He also seeks to subject certain real estate, the legal title to which is in the wife, to the payment of a judgment obtained against the husband for the said lumber, upon the ground that the title to the land is held by the wife in fraud of the husband's creditors. The defendants each separately demurred to the petition. The demurrers were sustained. The plaintiff appeals.

H. C. Hemenway, for appellant.

Struble, Rishel & Sartori, for appellees.

ROTHROCK, J.—The demurrers are based upon several distinct grounds, which are separately stated and numbered. The assignment of errors is in these words: "The appellant assigns as error the ruling of the court sustaining the several demurrers of the defendants, James H. Johnson and Philinda F. Johnson." Counsel for appellees insist that this assignment of error is not sufficiently specific. Section 8207 of the Code provides that "among several points in a demurrer, or in a motion, or instructions, or rulings in an exception, an

Blandon v. Glover.

assignment of error must designate which is relied on as an error; and the court will only regard errors which are assigned with the required exactness." We can see no escape from holding that the assignment in this case is insufficient, and that it cannot be regarded by the court. If we were to entertain the appeal, we would overrule many cases. See notes to section 3207 of *Millers's Code*.

AFFIRMED.

BLANDON V. GLOVER.

1. **PRACTICE: AMENDMENT TO CONFORM PLEADING TO EVIDENCE ENCOURAGED.** The statute, and the practice under it, as shown by the decisions, are very liberal in allowing amendments, and especially where the object is to conform the pleadings to the evidence; and it was error in this case to sustain a motion to strike such amendment from the files, after it had been filed with leave of the court.

Appeal from Buena Vista District Court.

MONDAY, DECEMBER 14.

ACTION to recover the price of a cow alleged to have been sold and delivered by the plaintiff to the defendant. There was a trial to a jury, and verdict and judgment were rendered for plaintiff. The defendant appeals.

Robinson & Milchrist, for appellant.

A. E. Clarke, for appellee.

ADAMS, J.—After the defendant had introduced his evidence and rested, he asked leave to file an amended and substituted answer, for the purpose of conforming his answer to the evidence. Leave was granted, but afterwards, upon motion filed by the plaintiff, the amended and substituted answer was stricken from the files. The case, involving less

67	615
84	348
67	615
1129	433
1129	434

The State v. Bissell et al.

than \$100, comes to us upon a certificate, and one of the questions certified is as to whether the court erred in striking the amended and substituted answer from the files. In our opinion it did. Our statute, and practice under it, as shown by the decisions, are very liberal in allowing amendments, and especially where the object is to make the pleadings conform to the evidence. It is, to be sure, objected in this case that the amended and substituted answer did not conform to the evidence. But it did so in the main, and the difference, if any, was not such, we think, as to justify the court in striking it from the files.

Some other questions are certified, but they will probably not arise upon another trial.

REVERSED.

THE STATE V. BISSELL ET AL.

1. **Intoxicating Liquors: SALE BY PHARMACISTS WITHOUT PERMIT NOT AUTHORIZED BY STATUTE.** If section 8 of chapter 75, Laws of 1880, had the effect to repeal the provisions of the Code forbidding apothecaries, as well as other persons, to sell intoxicating liquors without a permit, chapter 143, Laws of 1884, repeals said section 8, and enacts a general prohibitory law, without exceptions in favor of pharmacists; and the result is that licensed pharmacists may not, under existing legislation, (December, 1885,) sell intoxicating liquors without a permit.

Appeal from Harrison District Court.

MONDAY, DECEMBER 14.

THE defendants were jointly indicted and convicted for maintaining a nuisance by keeping a place for the sale of intoxicating liquors, contrary to law. They now appeal to this court.

Lehman & Park, L. R. Bolter and Charles McKinzie,
for appellant.

A. J. Baker, Attorney-general, and Baylies & Baylies, for
the State.

БРОК, ОН. J.—I. The facts of the case are not in dispute, and may be briefly stated. The defendants are druggists, and, without a permit from the board of supervisors, sold intoxicating liquors for medical purposes since the fifteenth day of October, 1884. The question for our determination is this: Under the statute now in force, may a druggist, holding a certificate from the state board of pharmacy, authorizing him to engage in the pursuit of an apothecary, lawfully sell intoxicating liquors for medical purposes without a permit?

II. Under the law forbidding the traffic in intoxicating liquors, as found in the Code, all sales of such liquors, except those made by persons holding a permit from the board of supervisors to sell for medical and other lawful purposes, are forbidden. It is insisted by defendant's counsel that section 8 of chapter 75, Acts of the Eighteenth General Assembly, amends and modifies the prior legislation so far as to authorize apothecaries, duly registered under the act, to sell intoxicating liquors for medical purposes, without the permit required of other persons. Counsel for the state deny this position. For the purposes of this case the position may be admitted, as our opinion is based upon the ground that if section 8, Chap. 75, Acts of the Eighteenth General Assembly, has the effect claimed, it is repealed by the subsequent acts of the Twentieth General Assembly, (chapter 143,) which substantially re-enacts the provision of the Code without any exception in favor of apothecaries.

III. The case, briefly stated, is this: Under the Code apothecaries were forbidden to sell intoxicating liquors without a permit. Chapter 75, Acts Eighteenth General Assem-

bly, amends or modifies the prior statute, and excepts apothecaries from the existing prohibition. Chapter 143 of the Acts of the Twentieth General Assembly repeals the provision of the Code providing a penalty for selling intoxicating liquors without a permit, and enacts a prohibition in almost the language of the prior statute, providing an increased penalty for the violation of the law. It thus appears that a statute, to which, by subsequent legislation, an exception was made, was repealed and re-enacted, without providing for the exception. The last statute is inconsistent with the one making the exception, and repeals it by implication. The last expression of the legislative will must prevail. That it was the purpose of the general assembly not to continue the exception of the pharmacy act, or, in other words, to repeal the provision containing that exception, is established beyond controversy by the fact that the last act is utterly inconsistent with the prior pharmacy statute. It contains a prohibition against all persons. The pharmacy act excepts apothecaries. It is the last statute, and must prevail. These conclusions are based upon familiar principles which will be everywhere recognized without the citation of authorities in their support. No question of the construction of the statute is in the case, as counsel of defendants seem to think and argue. The controlling question involves the fact of the repeal of the provision of the pharmacy statute in question. We are to go no further than to determine whether that provision is repealed by the later statute, in which we find a general prohibition in conflict with that provision. Both statutes cannot be upheld as to the subject involved in this suit. The first must give way to the second.

IV. Counsel for defendant call in question a statute passed by the Nineteenth General Assembly, repealing the provision of the pharmacy law considered in this case, and insist that it never took effect. It was not signed by the governor, and is not printed with the other statutes passed by that general assembly. Counsel for the state do not attempt to support

the statute, but admit that it never became operative. We are not required to give the statute consideration in view of the ground upon which we decide this case. We are not permitted to consider the policy of the statute in question, or inquire as to its effect. We can do nothing more than inquire whether there is a conflict between the statutes in question, and which one, under the rules of the law, must stand. Counsel for defendant express our duty in the following language so clearly and forcibly that it merits quotation and approval: "Not, however, according to the desire of any man or set of men is the law to be construed. Who may be hindered, who may be helped, is not the question here; not what should be, but what is, the law." The judgment of the district court is

AFFIRMED.

67	619
79	177
67	619
82	688
67	619
84	688

EIKENBERRY & Co. v. EDWARDS.

- 1. Contempt: PROCEEDINGS AUXILIARY TO EXECUTION: REFUSAL TO TURN OVER NOTES.** In a proceeding auxiliary to execution, the defendant was ordered by the judge to turn over certain notes to be sold in satisfaction of the execution, and, though the notes were not in defendant's hands, but in the hands of a resident of a distant state, they were under his control, and *held* that he was guilty of contempt for disobedience to the order.
- 2. Constitutional Law: PROCEEDINGS AUXILIARY TO EXECUTION: IMPRISONMENT FOR CONTEMPT.** Chapter 3 of title 18 of the Code, providing proceedings auxiliary to execution, for the purpose of discovering the property of the execution defendant, is not repugnant to §§ 9 and 10 of article 1 of the constitution, in that it provides (§ 3145) that "if any person, party or witness disobey an order of the court or judge or referee, duly served, such party or witness may be punished as for contempt." Such imprisonment does not deprive the prisoner of his liberty without "due process of law," as those terms were understood at the time of the adoption of the constitution. *Ex parte Grace*, 12 Iowa, 208, distinguished.

BECK, CH. J., and ADAMS, J., *dissenting*.

MONDAY, DECEMBER 14.

Certiorari. This is an original proceeding in this court to review an order made by the Hon. E. L. BURTON, judge of the district court of the Second judicial district.

T. B. Perry, for plaintiffs.

H. L. Dashiell and *G. D. Porter*, for defendant.

SEEVERS, J.—The plaintiffs recovered a judgment against the defendant, and caused an execution to be issued thereon, which was returned unsatisfied. Thereupon the plaintiffs filed a petition, in which it was stated that the defendant had in his possession property which he unjustly refused to apply in satisfaction of the execution; and an order for the appearance and examination of the debtor, as provided in Code, § 3135, was asked. Such an order was made, and the defendant appeared in response thereto. An examination was had, and the fact disclosed that the defendant had sold certain real estate, and received therefor promissory notes amounting to \$18,760, which, the day after the notice was served requiring him to appear for examination, he had sent to his son-in-law in Colorado. The district court of Monroe county, in which the proceeding was pending, made an order requiring the defendant to turn over the notes to the court, and a receiver was appointed to receive and take charge of said notes, and it was further ordered that they should be regarded as assets subject to be sold on execution. It was further ordered that, upon the notes being so turned over, they should be subject to any further order that might be made in vacation in relation thereto. The defendant failed to deliver the notes as required by the order, and afterwards he was, in vacation, adjudged by the judge of said court to be guilty of a contempt, and ordered to be committed to the jail of Wapello county until he obeyed the order of the court.

I. Counsel for the defendant insist that the defendant was not guilty of a contempt. The proceedings in question were

1. CONTEMPT: proceedings commenced under chapter 3, title 18, of the Code, auxiliary to entitled "Proceedings Auxiliary to Execution," execution: and section 3145 of that chapter provides that refusal to turn-over notes. "if any person, party or witness disobey an

order of the court or judge or referee, duly served, such person, party or witness may be punished as for contempt." The defendant certainly refused to obey the order of a court or judge. He therefore is clearly guilty of a contempt, unless the facts adduced on the examination will not warrant the order made, or the statute is unconstitutional. We have examined the record with care, and are of the opinion that, although the notes were in the actual possession of another, yet they undoubtedly were so held for the use and benefit of the defendant, and were under his control. The order, therefore, was fully warranted.

II. Is the statute unconstitutional? Counsel for the defendant cite and rely on *Ex parte Grace*, 12 Iowa, 208. It was

2. CONSTITUTIONAL LAW: proceedings held in that case that a similar statute was unconstitutional, because it conflicted with sections 9 auxiliary to and 10 of article 1 of the constitution, which provide that the right of trial by jury shall remain execution: imprisonment for contempt. provide that the right of trial by jury shall remain

inviolate, and that no person shall be deprived of life, liberty or property without due process of law. The only case cited by counsel in support of their position is *Ex parte Grace*. It will therefore be assumed that no adjudged case can be found which accords therewith, and yet it is true that similar statutes have been in force in several of the states for some years. Possibly the first state to enact such a statute was New York, and we are not advised that it has been declared unconstitutional, although questions under it have frequently been determined in the inferior courts of that state. *In re Pester*, 2 Code Rep., 98; *Sandford v. Carr*, 2 Abb. Pr., 462; *Driggs v. Williams*, 15 Id., 477; *Kearney's Case*, 13 Id., 459; *Tompkins Co. Bank v. Trapp*, 21 How. Pr., 17;

Eikenberry & Co. v. Edwards.

Gould v. Torrance, 19 Id., 560. Statutes substantially the same as ours have been held to be constitutional in *State v. Becht*, 23 Minn., 411, and *In re Burrows*, 33 Kan., 675; S. C., 7 Pac. Rep., 149.

Under the chancery practice as it existed at the time the constitution was adopted, a person could be deprived of his liberty or property, and such deprivation has always been regarded as having been accomplished by "due process of law," which has been defined to be "law in its regular course of administration through courts of justice." *Happy v. Mosher*, 48 N. Y., 313; *Mason v. Messenger*, 17 Iowa, 261; *Den., ex dem., Murray v. Hoboken Land etc. Co.*, 18 How., 272. In so far as the pleadings are concerned, the distinction between actions at law and proceedings in chancery have been abolished by the Code, and there is now but one form of action, which pertains to both law and chancery. Under the chancery practice as it existed when the constitution was adopted, and now under the Code, a creditor's bill could be filed, the object of which was the discovery and subjection of property to the payment of a debt or judgment. Proceedings auxiliary to execution, as provided in the statute, were unknown to the common law; and the object to be accomplished thereby, and the manner of doing it, are or may be quite similar to a creditor's bill, and may be well regarded as affording an additional remedy for the accomplishment of the same object. At least it may be said to be a statutory proceeding not in accord with the common law, but more nearly like a proceeding in chancery, and should, under the Code, be classed as a special proceeding, and tried as an ordinary action at law or proceeding in chancery, and the mode of trial will be determined by assigning the proceeding to whichever class it appropriately belongs. *Sisters of Visitation v. Glass*, 45 Iowa, 154. The statute contemplates a trial before a court, judge or referee; and such always has been the mode of trial in chancery cases. Witnesses may be examined, and the rights of the parties as fully

protected as in any other proceeding in chancery. The defendant, therefore, was not deprived of his liberty or property without due process of law, and therefore the statute is not unconstitutional.

There is a material difference between the present statute and that in force when *Ex parte Grace* was determined. Under the present statute the order for the appearance of the supposed debtor can only be made by the district or circuit court, or a judge thereof, and the examination must be had before one of such courts or judges, or before a referee. Such courts have full and complete jurisdiction of actions at law and proceedings in chancery. They may impanel juries before whom issues may be tried. The judges of said courts have all the powers possessed by judges of courts of general jurisdiction, and the statute under consideration cannot be said to be unconstitutional because the order for the appearance and examination may be made by a judge; nor can it be so said because the examination is had before the judge, unless the defendant asks to have it before the court; for, if such is his constitutional right, it is clear that such right may be waived. The statute in force when *Ex parte Grace* was determined provided that the order for and examination of the debtor could be made by the county court, or judge thereof, and the examination had before such court or judge. Such court was not a court of general jurisdiction. It had no power to try actions at law or proceedings in chancery. Its jurisdiction was limited and defined by statute. The court in *Ex parte Grace* laid some stress on the character and powers of the court before whom the proceeding was had, and the decision of this court in that case may be sustained because the court and judge thereof did not have the power to impanel a jury, and was not vested with the power and jurisdiction to try issues in actions at law or proceedings in chancery.

III. The Code commissioners recommended that the general assembly should amend the statute under considera-

tion in the Revision, by striking out the words
THE SAME "county court, or judge thereof," and providing that the order for the examination of the debtor should be issued by the district or circuit court, or a judge thereof, and that all the subsequent proceedings should be had before such court or judge. The recommendation was adopted, and the statute re-enacted, and it exists now in other respects in substantially the same form as it did when *Ex parte Grace* was determined. In addition to the foregoing, the Code commissioners recommended the enactment of certain provisions which it may be supposed would, in their opinion, clearly make the statute both constitutional and effective. These last provisions the general assembly failed to adopt, and it is therefore insisted, in substance, that it was the legislative intent that no change should be made to obviate the construction adopted by this court. But we think this conclusion should not be entertained. The statute, as it had existed and had been construed, failed to accomplish the results intended by its enactment. It had become practically obsolete. In view of the change made, and the re-enactment of the statute, it may well be supposed that the legislative thought was that the construction which had obtained had been obviated. For the reasons stated, the orders and proceedings before the district court and judge thereof must be

AFFIRMED.

BECK, CH. J., *dissenting*.—The statute under which the proceedings in this case were had are the sections of the Code which are here set out:

"SEC. 3135. When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the district, circuit or supreme court to the sheriff of the county where such debtor resides; or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered; or a transcript of a justice's judgment has been filed, and execution thereon is

returned unsatisfied in whole or in part,—the owner of the judgment is entitled to an order for the appearance and examination of such debtor.

“SEC. 3137. Such order may be made by the district or circuit court of the county in which the judgment was rendered, or to which execution has been issued, or, in vacation, by a judge thereof; and the debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order, to report either the evidence or the facts.”

“SEC. 3140. If any property, rights or credits subject to execution are thus ascertained, an execution may be issued, and they may be levied upon accordingly. The court or judge may order any property of the judgment debtor not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be delivered up, or in any other mode applied towards the satisfaction of the judgment.

“SEC. 3141. The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, and may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or may forbid any interference therewith.

“SEC. 3145. Should the judgment debtor fail to appear, after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories thus propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party or witness disobey an order of the court or judge or referee, duly served, such person, party or witness may be punished as for contempt.”

The statute authorizes the district and circuit courts, or the judges thereof, to require a defendant in execution to submit to an examination under oath (Code, § 3138) as to the prop-

erty he owns and its disposition. Witnesses may be required to appear and testify in the proceedings. Code, § 3139. The court or judge may, upon such proceedings, order the defendant to surrender any property, found to belong to him, to the court, which shall be held by the receiver. If the order be disobeyed, the defendant may be committed as for a contempt, and be subjected to imprisonment until he obeys the order. The effect of the provisions is to authorize a summary proceeding wherein the defendant may be deprived of his liberty.

The constitution of the state (article 1, § 9) declares that "no person shall be deprived of life, liberty or property without due process of law." The term "due process of law" means the ordinary judicial proceedings recognized by law, and provided for determining the rights of property and for subjecting the citizen to deprivation of his liberty for violation of the law. *Boyd v. Ellis*, 11 Iowa, 97; *Ex parte Grace*, 12 Iowa, 208; *Stewart v. Board Sup'rs*, 30 Id., 9. No man may be deprived of his property or liberty under this constitutional provision except upon a judicial determination obtained in the manner prescribed by law for proceedings in the courts. There must be an adjudication had in such proceedings in order to deprive the citizen of his liberty or property. The proceedings authorized by the statute quoted above are summary in their nature. They do not accord with the ordinary course pursued in judicial proceedings. The pivotal questions in the case,—namely, whether defendant owned property, whether he fraudulently disposed of it, whether it was under his control so that he could surrender it, and whether he fraudulently put it out of his control,—were not determined in the manner prescribed for the decision of such questions when the rights of property depend thereon. They were decided in a summary proceeding, and not in a case wherein the usual course of the law was pursued. The difference between this summary proceeding and an ordinary action at law or in chancery need not be suggested to the legal mind. They are many, and essential to the just administration of the law.

It is true that a commitment for contempt may be made in a summary manner; but it can only be made when based upon a prior adjudication of the matter which is the foundation of the contempt. For a disobedience of a lawful order of a court, an offender may be committed as for a contempt. But the order disobeyed, to make the commitment lawful, must have been rendered in the exercise of lawful jurisdiction. An order not made in a cause pending, or, if in such cause, not in accord with the essential proceedings prescribed by law, will not support a commitment for contempt. So, for contemptuous acts done in the presence of a court, the fact of such acts must be lawfully found and adjudicated by the court before the order of commitment can be made. Such adjudication must be made in the manner recognized by statute or the long-continued practice of the courts. But for contempts not committed in the presence of the court, the order disobeyed must have been made in proceedings which are recognized as being of the "due process of law." I reach the conclusion that the statute above quoted, authorizing the proceedings in this case, is in conflict with the constitution. These views are in accord with and supported by *Ex parte Grace*, 12 Iowa, 208. See, also, *State v. Start*, 7 Id., 501.

It is my opinion that the order committing the defendant should be set aside and held for naught, and that a judgment to that effect should be entered here, and certified to the judge of the second judicial district.

ADAMS, J., concurs in this dissent.

WHITE V. FARLIE ET AL.

1. **Practice in Supreme Court: EQUITY CASE: EVIDENT MISTAKE IN PLEADING: CAUSE REVERSED AND REMANDED WITH LEAVE TO AMEND.** Ordinarily this court has no power to remand an equity case triable *de novo*, but must try and determine it on the record presented; but there are exceptions to the rule, and it has been held that the power to remand exists when it is necessary for the purpose of effectuating justice. (See cases cited.) And in this case, where there was an evident mistake in the pleadings, which was not discovered until after the appeal, on account of which a judgment rendered upon the record would be unjust, *held* that the cause should be remanded with leave to the parties to replead, and to introduce such further evidence as they might desire.

Appeal from Mills Circuit Court.

MONDAY, DECEMBER 14.

ACTION IN EQUITY. Decree for plaintiff, and defendants appeal.

Watkins, Williams & Wright, for appellants.

Stone & Gilliland, for appellee.

SKEEVERS, J.—The petition states that the defendant Farlie, in February, 1883, was the owner of certain real estate, which is described in the petition, which she sold and conveyed to the plaintiff; and that she agreed that the plaintiff should have a road about twenty-five feet in width, commencing at the south-west corner of the land conveyed, and running thence west along and on the south line of the tract of land which adjoins the above-described land on the west, which, at said date, was owned and occupied by the defendant Enlitt. The petition also, in substance, states that the defendants have obstructed and interfered with the free use of the road, and an injunction was asked restraining them from so doing. The relief asked was granted. It will be observed

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that the road described in the petition runs west from the starting place. The evidence conclusively shows, if the defendants ever agreed to furnish or procure a road, that it was to run east from the place of beginning. The appellee concedes that the proposed road is not properly described in the petition, and that wherever the word "west" occurs in the petition it should be "east;" and he asks to have the case remanded, and the court below directed to allow the plaintiff to amend his petition, and therein properly describe the road, and that, when this is done, the decree be affirmed. To this appellants object, because the case is here for a trial anew, and that this court must affirm or reverse the judgment appealed from, or render such judgment as the inferior court should have rendered, as provided in section 3194 of the Code.

It is clear that we cannot affirm the judgment, for the simple reason that the appellee is not, under the evidence, entitled to the relief asked in the petition. If we should reverse on the ground that the plaintiff is not entitled to the relief asked, it is doubtful whether it would bar another action in which the plaintiff should ask proper relief. The appellant contends that he is entitled to a decree in this court, and that we have no power to remand, but must try and determine the case on the record now before us. That this is the ordinary rule in equity causes must be conceded; but to it there are exceptions, as will appear from the following adjudged cases: *Tascar v. Marshall*, 4 Iowa, 544; *Lyon v. Tevis*, 8 Id., 79; *Ware v. Thompson*, 29 Id., 65; *Jones v. Clark*, 31 Id., 497; *Miller v. Corbin*, 48 Id., 525; *Sweet v. Brown*, 61 Id., 669. While none of these cases are precisely like the one at bar, they do hold that the power to remand a case exists for the purpose, in a proper case, of effectuating justice.

The statute provides that the court may, at any time, in the furtherance of justice, permit a party to amend any pleadings to correct a mistake. Code, § 2689. To our

minds it is too clear for controversy that a mistake was made in describing the road in the petition. The record fails to show that such mistake was discovered until after the appeal. Without doubt, had attention been called thereto in the circuit court, it would have been corrected. It is obvious that if counsel for the appellants had knowledge of the mistake prior to the decision in the circuit court, they failed to disclose it to either the court or the counsel for the appellee. We are not prepared to say that they were bound to do so. The mistake is one that might have been made by the most careful practitioner, and we are unwilling to hold that the right to correct does not exist. On the contrary, we think such right, under the statute, cannot be successfully controverted. The only question, then, is whether the case should be simply remanded, or whether the judgment below should be reversed, and the case remanded with directions to the circuit court as to the future proceedings. In *Lyon v. Tevis*, before cited, the record was so confused that the court could not determine with safety to the parties what relief should be granted, and it was held that the court should have sustained a demurrer of one of the defendants on the ground that he was not a proper party; and to this extent the judgment was reversed, and the cause remanded with leave to the parties to replead.

This case is clearly presented by the record before us, and the appellants are in no manner responsible for the mistake which prevents us from determining the case on the merits. Besides this, we must either affirm or reverse, or render such a judgment as the circuit court should have rendered. Therefore the judgment of the district court must be reversed, and the cause remanded, with direction to both parties to replead, and if they, or either of them, so desire, additional evidence may be taken and introduced.

PENNINGTON V. THE WESTERN UNION TELEGRAPH CO.

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- I. Telegraph Companies: NEGLIGENCE IN TRANSMITTING MESSAGE:**
MEASURE OF DAMAGES: PROSPECTIVE PROFITS. Plaintiff's agent at Vicksburg, Michigan, telegraphed him the price at which he could buy a car load of apples, but the telegram as delivered purported to come from Vicksburg, Mississippi, where plaintiff had no agent, and to be signed by one unknown to plaintiff, in consequence of which plaintiff paid no attention to it. Afterwards the price of apples advanced, and plaintiff in buying was obliged to pay more than the price named in the telegram. *Held* that plaintiff's loss was not greater than the difference between a car load of apples at the price named in the telegram, and such greater amount, if any, as a car load was worth in the same market at the time the telegram was sent; and that, there being no evidence of such difference, plaintiff was entitled to recover only the amount paid for the telegram.

Appeal from Winneshiek District Court.

MONDAY, DECEMBER 14.

ACTION for damages alleged to have been sustained by the negligence of the company in the transmission of a telegram. There was a trial to the court, and judgment was rendered for the plaintiff. The defendant appeals.

Cooley & Akers, for appellant.

Cyrus Wellington, for appellee.

ADAMS, J.—The telegram in question was delivered to the defendant at its office in Vicksburg, Michigan, by one A. B. Huntley, the plaintiff's agent, and is in the following words:

“VICKSBURG, Michigan, October, 11, 1882.

“*To, George Pennington, Decorah, Iowa:* Can buy apples two dollars. Shall I ship one car?

“HUNTLEY.”

How it was transmitted to the company's agent at Decorah

does not appear, nor is it material. It was read and written by the Decorah agent as follows:

"Dated VICKSBURG, Mississippi, 11.

"*To George Pennington, Decorah, Iowa:* Can buy apples two dollars. Shall I ship one car?

"HAULKEY."

This was the telegram delivered to the plaintiff. Having no agent at Vicksburg, Mississippi, and no agent anywhere by the name of Haulkey, the plaintiff paid no attention to the telegram, and made no order for apples at that time through Huntley, and afterwards the price of apples was higher, and in purchasing he was obliged to pay more than the price mentioned in the telegram. The court found that the plaintiff sustained damages in the sum of \$122.35, and rendered judgment against the defendant therefor. The defendants assign as error that the court erred in allowing the plaintiff more damages than the amount paid for the telegram, to-wit, fifty cents and interest.

In *Hibbard v. W. U. Tel. Co.*, 33 Wis., 567, the court said: "Profits on a contract never made are quite too remote and uncertain to be taken into consideration." In the case at bar, the plaintiff merely lost an offer, and, if we were to apply the rule above mentioned, it would be clear that the plaintiff could not recover more than the cost of the telegram. But we need not go so far as to hold the above rule applicable. In no event could the plaintiff recover more than the value of the offer, and that could not be greater than the value of the contract would have been, in case the offer had been received and accepted. Now, the value of a contract for the purchase of property, where nothing is paid, is the difference between the amount agreed to be paid and such greater amount, if any, as the property may be worth in the market; and where damages are allowed for a breach of the contract, they are to be estimated as of the time of the breach. See Sedg. Dam., 313, and cases cited.

The offer in this case, which the defendant was asked to

Pennington v. The Western Union Telegraph Co.

transmit, was of a car-load of apples at two dollars, which it is said meant two dollars a barrel, and would have been so understood by the plaintiff. Now the loss of the offer was not greater than the difference between the price of a car-load of apples at two dollars a barrel, and such greater amount, if any, as a car-load was worth in the same market at the time the defendant's liability accrued. No rise or fall in the price of apples after that could change the defendant's liability. But the offer contained in the telegram is not an offer of specific apples at two dollars, nor of a given kind or quality; nor is there any evidence tending to show that apples of any kind or quality in the Vicksburg, Michigan, market were worth more than two dollars a barrel at the time of the defendant's failure to properly transmit the telegram delivered to it. Such being the fact, we are unable to see how the plaintiff has proven any damages beyond the cost of the telegram.

Many other questions are presented, but, in the view which we have taken of the case, they will not, we think, arise upon another trial.

REVERSED.

SUPPLEMENTAL OPINION.

ADAMS, J.—The plaintiff has filed a petition for a rehearing, in which he insists that the court has erred in its rule concerning the measure of damages. The plaintiff contends that the true rule is that where a contract of purchase is not entered into by reason of a loss of an offer of the contract through the negligence of the party intrusted with its transmission, the measure of damages is the difference between the contract price, as would have been offered, and such greater price as the commodity may bear at the time the party losing the offer obtained knowledge of the failure of transmission, by reason of which it had not been made. Several authorities are cited and relied upon, but in our opinion none of

them sustain the plaintiff's position. We can conceive that knowledge of the loss of an offer of a contract like the one in question—an offer for the sale of apples—might not be obtained until, in the progress of the season, sound apples would naturally be much higher, or it might not be obtained until the next season, when they might be much lower.

The general rule is that, where a person sustains an injury through the negligence of another, he is entitled to recover to the extent of the injury which the wrong doer should reasonably have apprehended. Under this rule, we thought that the loss of the offer could not be greater than the difference between the price which would have been offered, but for the failure of transmission, and the market price, if greater; and, as bearing upon that question, there was no evidence. It is true that, where a party has received an offer and *acted* upon it by an attempted acceptance, and governs himself upon the just supposition that he can rely upon a completed contract, and waits as long as he might reasonably wait, and he loses his contract through the negligence of the party charged with the duty of transmission, his damages are not necessarily to be estimated with reference to the point of time when there was a breach of the duty of transmission. In *True v. International Tel. Co.*, 60 Me., 9, the defendant was employed to transmit the acceptance of an offer of contract, and, by failure of the defendant, the plaintiff lost the contract, which was a contract of purchase, and the commodity rose in value while the plaintiff was relying upon the contract, and the court held that the plaintiff might recover as damages the difference between the contract price and the greater amount which the plaintiff was obliged to pay, in the exercise of reasonable diligence, after notice of the failure of the telegram. But that case, which seems to us the most favorable for the plaintiff of any cited, differs in important respects from the one at bar. The plaintiff had reason to suppose that he had a completed contract, and had bound himself to pay for the commodity, and must hold himself in readiness

to do so for such reasonable time as the transaction required.

Knowledge of the defendant's failure could not, in the nature of the case, be long kept from the plaintiff, and the rights of the plaintiff would then, or immediately thereafter, be fixed. The defendant was bound to know that the plaintiff would rely upon the contract for such reasonable time, and govern himself with reference to it. In the case at bar there was a mere uncommunicated offer. The plaintiff did not rely upon it in any proper sense, even if he expected it, because he did not know what it would be. Again, the time within which knowledge of the failure could be expected to come to the plaintiff, if ever, was entirely uncertain. Offers of sale are being constantly made by telegraph, and it will happen occasionally that an offer will be attempted, but will not really be made, on account of a failure of transmission. At what time knowledge of the failure, if ever, will come to the party to whom there was an attempt to make it, no one can foresee or estimate in the slightest degree. The rule contended for, it appears to us, would be dangerous in the extreme.

There is one other view of this case to which we desire to refer. The acceptance of the offer rested wholly in the plaintiff's volition. He was allowed to testify as to what he would have done, and the court made a finding as to what he would have done. We do not wish to be understood as holding that it was competent to go into an inquiry as to what the plaintiff would have done. It is not necessary to determine such question, and we do not undertake to do so. The plaintiff cites cases, and expressly calls our attention to them, in which it was held competent to show that an agent to whom a telegram of instructions was directed, but whom it did not reach, would have obeyed its instructions; but it is manifest that those cases are not strictly in point. We think that the petition for a rehearing should be

OVERRULED.

MERRILL V. BOWE ET AL.

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- 1. Judgment:** ACTION TO SET ASIDE BY ONE BOUND TO INDEMNIFY THE JUDGMENT DEFENDANT: COLLUSION: NOTICE. Plaintiff, believing that defendant B. had no valid claim against defendant G., growing out of a transaction in which they were all interested, agreed to indemnify G. against any judgment which B. might recover against him. Afterwards B. brought his action against G. and obtained judgment by default. G. hastily paid the judgment and threatened to sue plaintiff on his contract. Plaintiff in this action seeks to set aside the judgment on the ground of collusion between B. and G. But it appears that G. notified plaintiff of the pendency of the action, and that he had a right, under his contract of indemnity, to appear and defend thereto, but that, when he received the notice, he had forgotten about this provision in the contract, and so made no defense. The circuit court granted the relief asked by plaintiff, and B. alone appealed. *Held* that as against B. the decree contravened well-recognized principles relating to the conclusiveness of judgments, and that it must be reversed.

Appeal from Polk Circuit Court.

MONDAY, DECEMBER 14.

ACTION in equity to set aside a judgment obtained by the defendant William H. Bowe against the defendant L. H. Gibbs. There was a decree for the plaintiff. The defendant Bowe appeals.

Parsons, Perry & Sherman, for appellant.

Wright, Cummins & Wright, for appellee.

ADAMS, J.—The defendant Bowe demurred to the plaintiff's petition, and the demurrer was overruled. He elected to stand upon his demurrer, and decree was rendered against him. The question presented is as to the correctness of the court's order overruling Bowe's demurrer. The petition is a very long one, and we cannot properly set it out in full. The essential facts, as shown by the petition, are as follows: The

judgment in question was rendered, in Bowe's favor against Gibbs, for commissions alleged to be due from Gibbs for services in making a sale of certain real estate belonging to Gibbs. The plaintiff feels aggrieved by the judgment, because he had entered into a written contract with Gibbs that he would pay any judgment which Bowe might obtain against him for commissions in the matter of the sale. The plaintiff was himself the purchaser of the property, though in trust, as he alleges, for another party; and as a part of the consideration of the purchase he gave Gibbs the contract above referred to. Bowe had taken some part in the negotiations which resulted in the sale, but under such circumstances that he was not entitled to commissions, and, in giving the contract to Gibbs, the plaintiff believed that no judgment could be obtained by Bowe which it would become incumbent upon him to pay. But, the contract having been executed, Bowe and Gibbs, it is alleged, fraudulently colluded together to wrong the plaintiff; Bowe and Gibbs both knowing that there was really nothing due Bowe for commissions. Bowe brought his action against Gibbs, and Gibbs suffered judgment to be taken by default, and afterwards hastily paid it, and commenced threatening to sue the plaintiff on his contract of indemnity for the amount thereof. It is alleged that after default was taken, and before judgment was rendered, the plaintiff applied to Gibbs to allow him to file a motion in his name, but Gibbs refused him such privilege. In the contract the plaintiff had agreed to defend against any action that might be brought by Bowe, and he was notified of the action by Gibbs; but he was not expressly requested by Gibbs to defend, and had forgotten about his contract, and so did not give the case any attention until default had been taken. As to whether the plaintiff was guilty of negligence in not appearing and defending, the averments in the petition leave our minds in some doubt, but the question is one which it is not important to determine.

The controversy upon this appeal is solely between the

plaintiff and Bowe. The court set aside the judgment, and Gibbs does not complain, notwithstanding he had paid the judgment, and probably, in an action against the plaintiff upon his contract of indemnity, would have claimed the right to use the judgment as conclusive evidence of the amount which he was entitled to recover. It is Bowe who claims to be aggrieved by the action of the court, and the question is whether, taking all the allegations of the petition which are well pleaded to be true, Bowe was rightfully deprived of his judgment. To determine this we have to look carefully to the allegations made against Bowe. It is of no consequence to consider what Gibbs did, or omitted to do, except so far as Bowe was a party to his acts or omissions. It is very evident that if Gibbs had been guilty of fraud in this matter, as the plaintiff claims, he could not be allowed to make the judgment a basis of recovery in any action which he might bring against the plaintiff. But the fact that Gibbs might not be able thus to use the judgment would not necessarily show that Bowe had no right to enforce it against Gibbs.

We come, then, to consider as to what constitutes Bowe's offense in this matter, so far as the petition shows. It is sufficiently shown that Bowe knew, or should have known, that he had no valid claim for commissions, and brought his action, not only with such knowledge, but also with the knowledge that Gibbs held a contract of indemnity executed to him by the plaintiff. This is all that we can discover. The averment that Bowe fraudulently colluded with Gibbs is an averment of the conclusion which the plaintiff claims should be drawn from the facts, and is proper to be considered only as such.

Where a person brings an action upon a claim which he knows is invalid, and obtains a judgment by reason of the testimony of mistaken witnesses, or by reason of a mistaken view of the law on the part of the court, he is, without question, guilty of a great moral wrong, and not a word of

extenuation is to be said in its behalf. But the policy of the law is such that the judgment defendant is not allowed, under ordinary circumstances, to claim the right to have the judgment set aside upon such ground. Probably in many, if not a majority, of litigated cases where judgment is rendered against the defendant, he believes, not only that the plaintiff's claim is invalid, but that the plaintiff knew it to be invalid. But where the defendant has been duly served with personal notice, and nothing has occurred to prevent him from defending, he cannot be relieved from the judgment by a court of equity, unless the plaintiff was guilty of the fraudulent concealment of a material fact of which the defendant was excusably ignorant, or unless the judgment was obtained by a resort to some fraudulent practice in the conduct of the case. So far, we presume, that there is no controversy. If a judgment defendant could be allowed to apply to a court of equity to set aside the judgment upon the mere averment that the judgment plaintiff had knowledge that the claim was invalid, there would be no end of litigation.

While the case before us is not this, we have taken some pains to state the rule as between a judgment plaintiff and defendant, because we think that it has an important bearing. In the case before us it is not the judgment defendant who is complaining, but a person who had given him a contract of indemnity; and we have to determine whether this person can have relief against the judgment upon an averment that the judgment plaintiff had knowledge of the invalidity of his claim. It is shown that Bowe had knowledge of the contract given to Gibbs by Merrill. Now, if Bowe had agreed with Gibbs that notice of the action should not be given to Merrill, and notice had not been given, and Bowe had prosecuted his claim to judgment knowing that it was not a just claim, we are not prepared to say that his action might not have been deemed fraudulent as against Merrill; for, while we do not think that the judgment in such case would be conclusive as against Merrill, yet the judgment and con-

Merrill v. Bowe et al.

tract together would hang over him and his estate as a kind of menace. But Bowe not only did not make such agreement with Gibbs, but notice of the action was in fact given to Merrill. From that time Merrill must be deemed to have had an opportunity to defend, at least in such sense that Bowe's prosecution of his claim in the manner in which he did was not fraudulent as against him. It is true, Merrill says that he forgot that he had given a contract of indemnity, and also that the conversation between him and Gibbs was such that he supposed that defense would be made by Gibbs; but we can see nothing in these matters upon which Merrill can rely as against Bowe.

It may be that these matters may properly enough be urged by Merrill against the conclusiveness of the judgment if Gibbs should set it up in an action against him. But, however this may be, we think that Merrill's rights against Bowe are the same as they would have been if, when notified of the action, he had appeared and made defense, unless his failure to make defense was brought about by something for which Bowe was responsible; and we have to say that we have searched the petition in vain for the averment of any fact which so shows. We do not see, therefore, how a court of equity can set aside Bowe's judgment without contravening well-recognized principles of law. The decree, therefore, of the circuit court must be

REVERSED.

The State v. Norton.

97	641
81	848

THE STATE V. NORTON.

1. **Criminal Law: PRACTICE: NEGLECT TO READ INDICTMENT AND MAKE OPENING STATEMENT TO JURY: IRREGULARITY WAIVED.** The district attorney in this case introduced his evidence and rested without reading the indictment or making an opening statement to the jury. On this account the defendant then filed a motion for his acquittal and discharge; but the court overruled the motion and allowed the indictment to be read, and offered to allow defendant to make a statement of his defense, which he declined to do. *Held* that the defendant waived the irregularity by failing to object to the introduction of the state's evidence at the time, and that no reversal could be had on account thereof.
2. **Intoxicating Liquors: SALE BY UNLICENSED PHARMACIST THROUGH LICENSED CLERK.** An unlicensed pharmacist who conducts a drug-store cannot escape the penalty of the law for the unlawful sale of intoxicating liquors, by showing that the sales were made for medicinal purposes by his clerk, who was a licensed pharmacist; and evidence of such alleged facts was properly excluded.

Appeal from Hamilton District Court.

MONDAY, DECEMBER 14.

THE defendant was indicted for keeping, in a certain building, intoxicating liquors, with intent to sell the same in the building in violation of law. There was a verdict of guilty, and judgment was rendered upon the verdict. The defendant appeals.

N. B. Hyatt, for appellant.

A. J. Baker, Attorney-general, for the State.

ADAMS, J.—I. Upon the trial of the case the district attorney, by oversight, omitted to read to the jury the indictment, and omitted to make a statement of the case, but proceeded at once and introduced the evidence in behalf of the state, and rested. The defendant then filed a motion for an order directing his acquittal and discharge, on account

1. CRIMINAL
law: practice:
neglect to
read indict-
ment and
make opening
statement to
jury: irreg-
ularity
waived.

of the fact that the indictment had not been read, and no statement of the case had been made; but the court overruled the motion, and allowed the indictment to be read, and offered to allow the defendant to make a statement in respect to his defense, which the defendant declined to make. The defendant insists that the court erred in overruling his motion. But, in our opinion, the defendant's position cannot be sustained. Possibly, if the indictment had not been read at all, no conviction should have been allowed. But it was read, and the only irregularity was in the time in which it was read. That irregularity we think was waived by the defendant by his failure to interpose an objection to the introduction of evidence before it was read.

II. The defendant kept a drug-store, and the liquor, alleged to have been kept with an intention to sell the same in violation of law, was kept in the drug-store, or in a room connected therewith. The defendant claimed that the liquor was kept for the purpose of medicine, and that whatever had been sold had been sold for such purposes; and, while he did not claim to be a registered pharmacist, he offered to show that his prescription clerk was, and that all sales were made by him. But the court, upon objection by the state, excluded the offered evidence that the clerk was a registered pharmacist. In excluding such evidence the defendant contends that the court erred. It is provided in chapter 75 of the Acts of the Eighteenth General Assembly that "it shall be unlawful for any person not a registered pharmacist to conduct any pharmacy or drug-store." If the person conducting the drug-store in question was the defendant, then he was engaged in an unlawful business, for he was not a registered pharmacist. But he contends that it was his clerk, and not himself, who was conducting the drug-store, and that, if he had been allowed to show that his clerk was a registered pharmacist, he would have shown that the business of the drug-store was lawful. There is no doubt but that a person may lawfully

2. INTOXICATING
liquors:
sale by un-
licensed phar-
macist
through
licensed clerk.

The State v. Butler.

become the proprietor of a stock of drugs without being a registered pharmacist. But being such proprietor is quite different from conducting a drug-store. A room or building in which the business of selling drugs is conducted is a drug-store, and the conductor of the store, within the meaning of the statute, is, we think, the person who has the ultimate right to control the business in respect to its continuance or discontinuance, the employment of clerks, the fixing of prices, etc. It matters not with what powers a mere clerk may be clothed. He cannot be said to be the conductor of the store while his powers are merely derivative. In our opinion the design of the statute was to prohibit persons not registered as pharmacists from engaging in the responsible business of buying and selling drugs as dealers. In our opinion it was not material that the defendant's clerk was a registered pharmacist, so far as the question before us is concerned.

III. The court rendered judgment of a fine of \$250. The defendant insists that the judgment is excessive. But no good reason is shown to us why it should be reduced.

IV. It is said that the verdict is not sustained by the evidence, but we think it is. We see no error.

AFFIRMED.

THE STATE V. BUTLER.

1. **Larceny: POSSESSION OF STOLEN PROPERTY: EVIDENCE.** Evidence tending to show that defendant had the stolen horses in his possession examined, but not set out in the opinion, and *held* sufficient to warrant the verdict of guilty.
2. —: **ALIBI: INSTRUCTION.** The court instructed the jury that "if he (defendant) has shown that at the time of the larceny he was at such a distance from the scene of the larceny as that he could not have participated in the commission of the crime, this will overcome or rebut any presumption of guilt which would arise from the fact of his having possession of the property, if he had it in his possession at the time alleged." *Held* that the instruction was not vulnerable to the objection that it

The State v. Butler.

made the defense of *alibi* depend on the *distance* of the defendant from the scene of the crime, rather than upon his absence from it.

Appeal from Carroll District Court.

MONDAY, DECEMBER 14.

THE defendant was convicted in the district court of the larceny of two horses, and sentenced to a term of imprisonment in the penitentiary. From this judgment he appeals.

McDuffie & Howard, for appellant.

A. J. Baker, Attorney-general, for the State.

REED, J.—I. The evidence introduced on the trial shows, without any doubt, that the two horses described in the indictment were stolen on the night of the thirty-first of May, 1882, from the barn of the owner in Carroll county, and that they were found by the owner on the afternoon of the next day running at large on an open prairie near the farm on which the defendant lived, in Green county; and that they had been turned loose there by some person but a short time before the owner found them. There was no direct evidence tending to connect the defendant with the taking of the property. The state introduced evidence, however, which tended to prove that defendant had the stolen horses in his possession a short time before they were found on the prairie, and that he is the person who there turned them loose. It was proven that defendant did have in his possession, a short time before the stolen horses were found on the prairie, two horses of the same color as the stolen ones, but he denied in his testimony that they were the same animals. It is now insisted by defendant's counsel that the evidence did not warrant the finding of the jury that he had the stolen property in his possession. We do not deem it important to set out the evidence relied on by the state to establish that defendant had the

1. LARCENY:
possession of
stolen prop-
erty: evi-
dence.

property in possession. It is sufficient to say that we have each read the evidence, and, in our judgment, it abundantly sustains the verdict.

II. The defendant introduced evidence tending to prove an *alibi*. As bearing on that question, the court gave the following instruction to the jury: "The defendant has introduced evidence tending to prove that on the night on which it is claimed the larceny was committed he was at home at his father's house, and that he remained there during the whole of that night, so that he could not have been engaged in the taking of said property. If he has shown that at the time of the larceny he was at such distance from the scene of the larceny as that he could not have participated in the commission of the crime, this will overcome or rebut any presumption of guilt which would arise from the fact of his having possession of the property, if he had it in his possession at the time alleged." Defendant's counsel take exception to this instruction. The objection urged against it is that "it makes the establishment of the *alibi* depend, not upon the fact that he was in another place, but upon the *distance* between where the defendant claims he was and the place where the crime was committed." We think there is no merit in this objection. The language of the instruction is, possibly, not the most exact that might have been used to express the idea intended to be conveyed, but the jury could hardly have failed to understand from it that defendant was entitled to an acquittal if he had proven that he remained at his father's house during all of the night on which the crime was committed. We have found no error in the record, and the judgment must be

AFFIRMED.

67	640
83	345
67	640
110	455

BRAINARD V. SIMMONS, GARNISHEE.

1. **Garnishment: EXEMPT PROPERTY HELD UNDER FRAUDULENT CHATTEL MORTGAGE: LIABILITY OF GARNISHEE FOR VALUE OF: JUDGMENT ON UNCERTAIN EVIDENCE.** Where the evidence showed that the garnishee held property of the execution debtor, to the value of \$700, under a chattel mortgage which was fraudulent, because made for the purpose of putting the property beyond the reach of creditors, but that a portion of the property so held was such as was exempt in the hands of the execution debtor, *held* that judgment could not be rendered against the garnishee for the value of such exempt property; and, since there was no evidence as to the value of the property so exempt, it was impossible for the court to determine for *how much* the garnishee was liable, and that it was error to render judgment against him for any amount whatever.
2. **Referee: REPORT OF: EVIDENCE TO SUPPORT.** The report of a referee, like the verdict of a jury, will not be disturbed on appeal when there is any evidence which tends to support it.

Appeal from Clarke Circuit Court.

MONDAY, DECEMBER 14.

APPELLANT was garnished on an execution issued on a judgment in favor of plaintiff and against one Edsom Pennell. He answered denying that he was in any manner indebted to Pennell, or that he had any property in his possession belonging to him. Plaintiff filed a pleading controverting this answer. The case was then sent to a referee for trial, and judgment was rendered against the garnishee on the report of the referee. The garnishee appeals.

Temple & Tallman, for appellant.

W. M. Wilson, for appellee.

REED, J.—The pleading filed by plaintiff controverting the answer of the garnishee alleges that, after the notice of

Brainard v. Simmons, Garnishee.

1. GARNISHMENT: exempt property held under fraudulent chattel mortgage; liability of garnishee for value of: judgment on uncertain evidence.

garnishment was served on him, the garnishee had in his possession property belonging to Pennell of the value of \$800; and that he took possession of said property under a chattel mortgage executed to him by Pennell, but that said mortgage was given without consideration, and was executed for the purpose of putting the property covered by it beyond the reach of Pennell's creditors. The referee found that the mortgage was given as alleged in the pleadings, and that the garnishee took possession of the property under it. He also found that the mortgage was given without consideration, and for the fraudulent purpose alleged, and that the property covered by it was of the value of \$700. Also that the garnishee permitted Pennell to sell a portion of the property, and to appropriate the proceeds to his own use. Also that the garnishee, after the notice of garnishment was served on him, sold a portion of the property at private sale as the property of Pennell, and permitted Pennell to make such sales of it, and made no claim at the time that he had any interest in it, and that the property and its proceeds were thus put beyond reach of Pennell's creditors. Another finding is that Pennell was the head of a family, and that a portion of the property in his hands would have been exempt from execution. But the referee finds, as a conclusion of law, that said property would not be exempt in the hands of the garnishee, and that he is answerable in this proceeding for the value of such property.

The garnishee filed exceptions to the report of the referee, and a motion to set it aside, one ground of which was "that the report of the referee fails to find the value of that part of the property which was exempt from execution in the hands of the execution defendant." Another ground of exception was that the conclusion that the garnishee was answerable in this proceeding for the value of that portion of the property which would have been exempt from execution in Pennell's hands is contrary to law. The circuit court

overruled the motion and exceptions, and entered judgment against the garnishee, as recommended by the referee, for the amount of plaintiff's judgment against Pennell; together with the costs which accrued in the action in which that judgment was obtained, and in the garnishment proceeding. This judgment, it will be observed, is based upon the findings of the referee; and the question as to its correctness depends upon whether the facts found show a liability by the garnishee for the amount of the judgment. The finding is that the garnishee, when he was served with notice of garnishment, had in his possession property of the value of \$700 belonging to Pennell; and that the mortgage under which he took possession of it was fraudulent, but that a portion of the property in Pennell's hands was exempt from execution. Under this finding, there can be no question as to the liability of the garnishee for the value of that portion of the property which was not exempt from execution; but it is impossible to determine from the finding what that value is. The finding is that the value of the property in the aggregate is \$700, but there is no finding as to the separate value of any portion of it. The question, then, whether the circuit court was warranted in rendering judgment against the garnishee for the amount it did, or for any amount, depends, we think, upon whether the conclusion of law by the referee, that the garnishee is answerable for the value of the exempt property, is correct. If the garnishee had received the proceeds arising from the sale of the exempt property, it may be that he would be answerable for the amount thereof. Counsel for plaintiff contends that he would be so liable, but whether this position is sound or not we need not consider, for the finding does not determine that any portion of the proceeds arising from the sale of the property ever came into his hands. The question, then, is whether the garnishee is answerable to the creditors of Pennell for the value of exempt property by reason of the facts that he took possession of it under the mortgage and sold it

 Brainard v. Simmons, Garnishee.

for Pennell's benefit, or permitted him to sell it. In our opinion, he is not rendered liable by these facts. If the mortgage had been valid, it would have divested Pennell of his privilege or right of exemption in the property only so far as the debt secured by it was concerned. *Collett v. Jones*, 2 B., Mon., 19; *Evans v. St. Paul Harvester Works*, 68 Iowa, 204.

But the finding is that the mortgage in question is invalid, and that Pennell owed the garnishee no debt which could be secured by it. It is impossible, we think, that it could have been more effective in divesting Pennell's right of exemption than a valid mortgage which secured an actual indebtedness would have been. The property, then, was exempt from execution when the garnishee was served with the notice of garnishment, and it continued to be so exempt until he parted with the possession; and there is no principle upon which he can be held answerable to the creditors for it. We reach the conclusion, therefore, that the circuit court was not warranted by the findings of the referee in rendering judgment against the garnishee for any certain amount. The exceptions and motion to set aside the finding should have been sustained on the ground set out above.

Another ground of exception to the report was that the finding that the mortgage was not supported by a consideration, and that it was given for the purpose of putting the property beyond the reach of Pennell's creditors, is not supported by the evidence. Appellant insists that the report should have been set aside on this ground. The finding of the referee has the force of a special verdict by a jury, and this court would be warranted in setting it aside only in case there appeared to be an absence of evidence to sustain it. Without setting out in detail the evidence upon which the cause was submitted before the referee, we deem it sufficient to say that there was evidence tending to prove the facts found by him, and we cannot disturb the judgment on this ground.

REVERSED.

BRADLEY V. COLE.

67	650
79	343
67	650
82	539
67	650
102	135
67	650
113	662
67	650
1125	189
67	650
144	402

- 1. Taxes on Land: PAYMENT BY HOLDER OF SHERIFF'S DEED: FAILURE OF TITLE: RECOVERY OF REAL OWNER'S GRANTEE WITH NOTICE: LIEN.** Where one holds a sheriff's deed to land, and, relying in good faith upon his title under such deed, he pays the taxes on the land, but the title is afterwards adjudged to be in another, he may have a lien established upon the land, as against such other person's grantee with notice, for the amount of the taxes so paid, and may have a personal judgment against such grantee for such portion of the taxes as were paid after he became the owner of the land; and one who takes the land by a mere quit-claim is charged with notice of the equities of the person so paying the taxes. See opinion for cases followed and distinguished.
- 2. Former Adjudication: HOW FAR BINDING.** A former adjudication in a cause between plaintiff and defendant's grantor does not bind plaintiff as to a question not raised in that cause.
- 3. Statute of Limitations: NON-RESIDENT DEFENDANT: CAUSE OF ACTION ARISING IN THIS STATE: INSTANCE.** A cause of action arising in this state is not barred by the statute of limitations when the defendant has always resided in another state, though it might be barred by the laws of the state of his residence; and an action to recover taxes paid by mistake on the land of another in this state, and to enforce a lien thereon, is based upon a cause arising in this state. *Goodnow v. Stryker*, 62 Iowa, 221, followed.
- 4. Innocent Purchaser: ONE TAKING BY QUIT-CLAIM DEED IS NOT.** One who takes land by a mere quit-claim deed is charged with notice of prior equities against his grantor.

Appeal from Cerro Gordo Circuit Court.

MONDAY, DECEMBER 14.

ACTION to recover on account of taxes paid by plaintiff upon certain lands claimed by him, the title to which, in an action between the parties, was adjudged to be in defendant. Plaintiff asks that a lien for the amount paid by him be established upon the lands. Both parties appeal.

Richard Wilber, for plaintiff.

Miller & Cliggitt, for defendant.

BECK, CH. J.—I. The action is triable in this court *de novo*. Plaintiff, in his petition and amended petition, seeks to recover for taxes paid upon the lands from 1861 to 1874, inclusive, except the year 1872. He asks that a lien be established upon the lands for the amount he may be entitled to recover. By the decree of the circuit court plaintiff recovered for the taxes paid by him for the years from 1868 to 1874, inclusive. It is shown by the record that plaintiff, during the time he was paying taxes upon the lands, claimed title thereto under a sheriff's sale and deed made upon a decree of foreclosure of a trust deed. In an action brought by plaintiff, and finally determined in this court in 1877, the title to the land was found not to be in plaintiff, but to be in defendant. See *Bradley v. Jamison*, 46 Iowa, 68.

II. The record establishes, without a doubt, that plaintiff paid the taxes for which he claims to recover, in good faith, believing that he had a valid title to the lands. He claims the lands under a judicial sale and a sheriff's deed, and, while so claiming, paid the taxes. His title, though held defective, certainly amounted to color of title, and would have made any possession which he may have held under it lawful; that is, he would not have been regarded as a mere trespasser. Had he made improvements in good faith upon the lands while holding possession under his title, he could have recovered under our statute the value thereof before being ejected therefrom. Code, §§ 1976–1987. The payment of taxes being made in the lawful exercise of ownership over the lands, which the law authorizes under color of title, and in the discharge of the duty of a citizen, the plaintiff ought to be protected, and ought to recover for the outlays made by him in payment of his taxes in an action against the owner. The payments being made for the protection of the property, and redounding to the benefit of the real owner of the land, he, *ex æquo et bono*, ought to reimburse plaintiff.

Bradley v. Cole.

The facts of this case bring it within the doctrine of *Goodnow v. Moulton*, 51 Iowa, 555, and *Goodnow v. Stryker*, 62 Id., 221, and distinguish it from *Garrigan v. Knight*, 47 Id., 525, as held by the majority of the court. Indeed, it would seem that, as plaintiff in this case claimed title under a judicial sale, he was authorized to rely upon its validity with the degree of confidence which the tax-payer in the case of *Goodnow v. Moulton* could not have had, as he did not claim under such a sale. All men presume, as does the law, that judicial proceedings are correct. Resting upon this presumption, one acquiring a title by judicial sale is surely authorized to regard the land as his own; and for its protection, and in the discharge of his duty as a good citizen, he ought to be permitted to pay the taxes without peril of loss.

III. Defendant insists that the question of plaintiff's right to recover the taxes was adjudicated against him in the action wherein it was found and adjudged that the title is held by defendant. But we do not find that the question was presented for adjudication in that case. Plaintiff did not claim to recover therein any sum advanced by him in payment of taxes. He sought no relief other than that his title be quieted. Payment of taxes by plaintiff, and his right to recover therefor, were not matters in issue and adjudged in the case.

IV. The defendant maintains that the action is barred by the statute of limitations. *Both plaintiff and defendant are non-residents of the state. Plaintiff's cause of action accrued upon the adjudication that defendant held the title, and it arose in this state. See *Goodnow v. Stryker*, 62 Iowa, 221. Surely his right of action to enforce the lien upon the lands arose in this state where the lands are situated and nowhere else.

V. At the time of the payment of some of the annual taxes the lands were not owned by defendant, being conveyed to him afterwards. It is insisted that plaintiff cannot recover therefor. Jamison acquired the

2. FORMER adjudication: how far binding.

3. STATUTE of limitations: non-resident defendant: cause of action arising in this state.

SAME AS NO. 1.

lands in 1860, and conveyed them to defendant in January, 1868, by quit-claim deed. Plaintiff's equitable right to a lien cannot be enforced against one holding the lands without notice thereof. But a grantee of the owner of the lands at time of the payment of the taxes, who had notice of plaintiff's equity, and purchased subject thereto, stands in the shoes of his grantor, and the lands in his hands are subject to plaintiff's claim and lien. Defendant acquired the lands by quit-claim deed, and is charged with notice of plaintiff's equities, and the law regards his purchase as subject thereto. These positions are based upon familiar doctrines, which will be everywhere admitted without support of authorities. *Fogg v. Holcomb*, 64 Iowa, 621, is not in conflict with our conclusion. It is not shown that the land-owner in that case was chargeable with notice of the equities of the tax-payer existing when the title of the lands was conveyed to him. In our opinion, plaintiff is entitled to a lien upon the lands for all the taxes paid by him. He ought not, however, to recover a personal judgment against defendant for taxes paid before he became owner of the lands; but such a judgment should be rendered for the taxes paid afterwards. The cause will be remanded for a decree in harmony with this opinion, or, at plaintiff's option, such a decree may be entered here.

Reversed on plaintiff's appeal. Affirmed on defendant's appeal.

GOODNOW V. WELLS ET AL.

1. **Taxes on Land: PAYMENT THROUGH MISTAKE AS TO TITLE: RECOVERY FROM REAL OWNER: INTEREST: LIEN: STATUTE OF LIMITATIONS: FORMER ADJUDICATION.** Many of the questions raised in this case, having been often determined by this court, (see cases cited,) are not again argued in the opinion.
2. **Practice in Supreme Court: ERRORS NOT ARGUED NOT CONSIDERED.** Errors, though assigned, will not be considered unless urged in argument.
3. **Administrator: ACTION IN CHANCERY AGAINST TO ENFORCE LIEN: KIND OF PROCEEDINGS: OBJECTION TOO LATE.** The enforcement of a lien upon the land of a decedent could not be procured in probate proceedings, and an action therefor was rightly brought in chancery; and, even if the proceedings could and should have been in probate, the administrator, after appearing and defending in the court below, without making objection there to the kind of proceedings, could not make such objections for the first time in this court.
4. **Public Lands: DES MOINES RIVER GRANT: WHEN LANDS BECAME TAXABLE: REVISION OF 1860, § 711.** Lands acquired from the state of Iowa under the Des Moines river grant became taxable the year after the purchase thereof from the state, under § 711 of the Revision of 1860, regardless of the date when the grant was confirmed to the state by act of congress. Such confirmation related back to the date of the purchase from the state, and inured to the benefit of the purchaser. See cases cited in opinion.
5. **State and Federal Supreme Courts: INTERPRETATION OF STATUTES OF STATE: CONFLICT OF DECISIONS: WHICH PREVAILS: ILLUSTRATION.** It is a rule nowhere disputed that the decisions of the supreme court of a state, interpreting a statute of such state, must be followed by the federal courts; and where the supreme court of the United States, upon a mistaken view of the purport and effect of the decisions of the supreme court of the state in such a case, renders a decision in conflict therewith, such decision is not binding on the state courts. For this reason, the opinion of the supreme court of the United States in *Litchfield v. County of Webster*, 101 U. S., 773, which construes § 711 of the Revision of 1860, and holds that under it lands are not taxable until the next year after a patent could be demanded for them, being based upon a misunderstanding of decisions of this court in cases cited in the opinion, and in conflict with those decisions, is not to be followed by this court.

67	654
88	179
67	654
100	655
67	654
d107	202
67	654
a108	327
67	654
111	170
111	599
67	654
136	718

Appeal from Webster Circuit Court.

MONDAY, DECEMBER 14.

ACTION in chancery to recover for certain taxes paid by plaintiff's assignor upon lands, the title whereof was in the defendants or their grantors, and to enforce a lien upon the lands for the amount of the taxes paid. The relief prayed for by the plaintiff was granted by the decree of the circuit court, from which defendants appeal.

Theodore Hawley, for appellants.

George Crane, for appellee.

BECK, CH. J.—I. This action involves no facts or questions of law which have not before been presented to and determined by this court in the numerous cases brought to recover taxes paid upon lands by claimants thereto under the grant by congress to the Dubuque & Sioux City Railroad Company. These actions, as well as this, were prosecuted against the claimants under what is called the "Des Moines River Grant," and a subsequent joint resolution of congress of March 2, 1861, which, by the decision of the United States supreme court, were held to pass the title to the lands as against the railroad grant. By reference to the following cases, the legislation and other facts involved in the questions arising in regard to the right of the claimants, under the railroad grant, to recover for taxes paid by them against the holders of the title under the Des Moines River grant, may be fully discovered. *Iowa Homestead Co. v. Webster Co.*, 21 Iowa, 221; *Dubuque & P. R. Co. v. Webster Co.*, Id., 235; *Stryker v. Polk Co.*, 22 Id., 131; *Litchfield v. Hamilton Co.*, 40 Id., 66; *Goodnow v. Litchfield*, 59 Id., 226; *Goodnow v. Stryker*, 61 Id., 261; *Same v. Same*, 62 Id., 221; *Goodnow v. Litchfield*, 63 Id., 225;

1. TAXES on land: payment through mistake as to title: recovery from real owner: interest: lien: statute of limitations: former adjudication.

Goodnow v. Wells et al.

Goodnow v. Moulton, 51 Id., 555; *Litchfield v. County of Webster*, 101 U. S., 774; *Wolcott v. Des Moines Co.*, 5 Wall., 681; *Homestead Co. v. Valley Railroad*, 17 Id., 153.

II. It is insisted by counsel for defendant that the action is barred by the statute of limitations of the state of New York; that a decision in a prior action operates as an adjudication of the rights of the parties in this case; and that the circuit court erred in allowing interest upon the sum paid by plaintiff from the date of payment. But these precise points have been decided by this court, upon the same state of facts, adversely to the position of defendant's counsel. See *Goodnow v. Stryker*, 62 Iowa, 221; *Goodnow v. Litchfield*, 63 Id., 226.

III. Objections are made to the decree upon the ground that a lien is enforced against certain specified land and upon the lands owned by certain defendants. These objections are not argued. Attention is called to them briefly by what would probably be considered sufficient as an assignment of errors. But it cannot be claimed that there is an attempt to argue the objections. Under a familiar rule, we are not permitted to consider objections that are not argued.

IV. One of the defendants, J. P. Doliver, is an administrator, and his intestate held title to the land, and, if alive, would have been liable to plaintiff on account of the taxes paid by him. The decree runs against the administrator, and is made a lien on the lands upon which the taxes in question were levied.

Counsel for defendant now object to the decree "because the claim upon which this action is brought had never been stated, sworn to and filed, and a copy served on the administrator; nor had the same been approved by the administrator." This objection was first made in this court, and was urged in no form in the circuit court. The administrator appeared, and answered in the case, urging many

2. PRACTICE
in supreme
court: errors
not argued
not consid-
ered.

3. ADMINIS-
TRATOR: ac-
tion in chan-
cery against
to enforce
lien: kind of
proceedings:
objection too
late.

defenses, but nothing of this kind. If there is anything in it, the objection comes too late. The circuit court has jurisdiction of the parties and the subject-matter of the action, and could have entertained proceedings for the allowance of the claim as is done in probate cases. It also has jurisdiction of the case in law or chancery, if it may be prosecuted in either forum. Now, if the case should have been prosecuted by probate proceedings, the defendant, having appeared and presented defenses in this action, cannot now defeat it on the ground that the claim should have been proved in the manner prescribed for probate cases. It is simply the case of the prosecution of an action by wrong proceedings. In addition to this, it may be said that the relief sought in this action is the enforcement of a lien, which could not have been obtained in probate proceedings. The action was therefore rightly brought in chancery. *Baldwin v. Tuttle*, 23 Iowa, 66; *McCrary v. Deming*, 38 Id., 527; *McName v. Malvin*, 56 Id., 362.

V. It is insisted that the evidence fails to show an assignment of the claim to plaintiff, and that he is not, therefore, the real party in interest. But the abstract before us shows that the due assignment of the claim to plaintiff is admitted.

VI. The plaintiff's grantors claimed title to these lands under a grant of congress made in 1856 to the Dubuque & Pacific Railroad Company. Defendant acquired title thereto under a grant by congress made in 1846, and confirmed and extended by a joint resolution of congress of March 2, 1861. This resolution confirmed the grant as to all lands above the Raccoon Forks which were held by *bona fide* purchasers under the state. The state conveyed the land to defendant's grantors in 1858. Now, it is plain that, upon the passage and approval of the join resolution, the title of the land passed from the federal government to the grantees of the state. The state had conveyed the land, though at the time it held no title; but the joint resolution, if it did not directly vest the

4. PUBLIC
lands: Des
Molnes river
grant: when
lands became
taxable: re-
vision of 1860,
§ 711.

title in the state's grantee, did vest it in the state, and that title inured to the benefit of the grantee, who thereby became clothed with the title. See *Wolcott v. Des Moines Co.*, 5 Wall., 681, 687. The lands in question are above the Raccoon Forks, and are covered by the legislation and conveyance referred to above. The act of congress of July 12, 1862, extending the grant of 1846 to all alternate sections of odd numbers within five miles of the Des Moines river above the Raccoon Forks, does not apply to or affect the lands in controversy, for they had already been confirmed to the state and its grantees by the joint resolution of March 2, 1861. We discover that the title fully vested in defendant's grantors March 2, 1861. Under the laws of the state then in force (Revision, § 710) all property was taxable except such as was exempted by Revision, § 711, which provides (page 7) that government lands entered or located, or lands purchased from the state, shall not be taxed for the year in which the entry, location or purchase is made. The terms "enter" and "locate," when applied to the acquisition of lands from the government, have a fixed and certain meaning, and cannot be applied to the grants of land by a congressional act. Lands are "entered" when purchased at the government land-office, and "located" when "scrip," or other instruments calling for specified quantities of land, are used in the purchase of the lands, which are then said to be "located" under these instruments.

It is a familiar rule that congressional grants of lands of the character of the one under which defendants claim operate *in presenti*, and pass the title without conveyances or other assurances. It sometimes is necessary to select or otherwise designate the lands which are conveyed by the grant, but that was not necessary in the case of the grant in question. It cannot be said that the lands of defendants were "entered" or "located." They were in fact conveyed by a congressional grant. It is clear that the provision above quoted, excepting lands from taxation, does not apply to these lands as

having been "entered" or "located." The lands were not *purchased* from the state in 1861, but in 1858, and the legislation and patent of the state conveyed the state's interest in the land; and the interest afterwards acquired by the state inured to the purchaser, and his title, by relation, ran back to the grant by the state. See *Wolcott v. Des Moines Co.*, *supra*. The lands, then, cannot be exempt from taxation as having been purchased from the state in 1861. We reach the very satisfactory conclusion that the lands were subject to taxation for the year 1861. We have heretofore held that lands acquired under the Des Moines river grant were taxable for the year 1861. See *Stryker v. Polk Co.*, 22 Iowa, 131; *Litchfield v. County of Hamilton*, 40 Id., 66; *Goodnow v. Stryker*, 62 Id., 221.

VII. Counsel for defendant, in support of the position that, under section 711 of the Revision, the lands in question

5. STATE and federal supreme courts: interpretation of statutes of state: conflict of decisions: which prevails: illustration. were exempt from taxation for the year 1861, cites *Litchfield v. County of Webster*, 101 U. S., 773, which construes that section, and holds that under it lands are not taxable "until the next year after a patent could be demanded for them."

This decision is based upon a mistaken view of the purport and effect of the decisions of this court in *McGregor & M. R. R. Co. v. Brown*, 39 Iowa, 655; *Iowa Falls & S. C. R. Co. v. Cherokee Co.*, 37 Id., 488; *Goodrich v. Beaman*, Id., 563; *Iowa Falls & S. C. R. Co. v. Woodbury Co.*, 38 Id., 498. These decisions hold that lands acquired through a congressional grant to the state, and by a grant of the state, become taxable when the conditions of the grants are performed,—or, in other words, when the lands have been "earned" by the grantee by the performance of the conditions of the grant,—and that the patent for the lands issued by the governor of the state is evidence that the lands were, at the time of the issuance thereof, so "earned." These cases do not hold that lands are not taxable until patents are issued therefor. When patents are spoken of in these decis-

ions, conveyances from the state by the governor are meant. As a matter of fact the United States has never patented lands to the state under the Des Moines river grants. Therefore the word "patent," when used by this court and the United States supreme court in connection with these lands, must be understood to refer to conveyances made by the state. The doctrine of this court is that lands held under the congressional and state grants, as are the lands involved in this action, are taxable when earned under the conditions of the grant, of which patents issued by the governor of the state are evidence. As we have seen, the lands in question were conveyed by the state in 1858 to defendant's grantor. They were therefore taxable for subsequent years. Doubtless the supreme court of the United States was misled by the last sentence in the opinion of this court in *McGregor, etc., R. Co. v. Brown, supra*, which, it must be admitted, is not an accurate expression of the effect of the statute and our prior decisions, if the word "patented" is to be understood as referring to a conveyance by the United States. The sentence is in these words: "Government lands are not taxable until a year after they are patented;" citing Rev., 1860, § 711. The statute cited declares that lands are not taxable until the next year after they were "entered" or "located" or "purchased from" the state. Lands "entered" and "located" may be and often are taxed before patents are issued, which are sometimes delayed for many months. It is plain that the word "patented" is used in the quotation just presented with reference to conveyance by the state, and not to patents by the United States. The decision of the United States supreme court interpreting the statute of this state in question is clearly incorrect, and in conflict with prior decisions of this court. We cannot, of course, be expected to follow it and overrule our prior decisions. It is a rule nowhere disputed that the decisions of the supreme court of a state interpreting a statute of such a state must be followed by the federal courts.

Goodnow v. Plumb.

The foregoing discussion disposes of all questions in the case. The judgment of the circuit court must be

AFFIRMED.

GOODNOW v. PLUMB.

67 661
43 236

1. **Taxes on Land:** PAYMENT THROUGH MISTAKE AS TO TITLE: RECOVERY. *Goodnow v. Wells*, ante, p. 654, followed.
2. **Change of Venue:** OBJECTION FOR FIRST TIME ON APPEAL. As the abstract does not show that any objection was made below to the change of venue here complained of, such complaint cannot now be considered.

Appeal from Webster District Court.

MONDAY, DECEMBER 14.

ACTION in chancery to recover for taxes paid by plaintiff upon certain lands owned by defendant, and to enforce a lien thereon for the amount so paid. A decree was rendered by the district court granting the relief sought by plaintiff. Defendant appeals.

Theodore Hawley, for appellant.

George Crane, for appellee.

BECK, CH. J.—I. This case involves the same questions of law arising upon like facts which are decided in the second, sixth and seventh points of the opinion in *Goodnow v. Wells*, ante, p. 654, decided at the present term. It is unnecessary to discuss these questions again, or to notice them further than to announce that in their disposition we follow our ruling in that case.

II. The venue of the cause was changed upon motion of plaintiff, which is now complained of by defendant as erroneous, for the reason that an affidavit upon which it was made

 Goldsmith, Assignee, v. Willson et al.

was insufficient. But the abstract before us does not show that the order making the change of venue was excepted to in the court below. It therefore cannot be made a ground of objection in this court.

No other questions are presented in the argument of counsel. The judgment of the district court must be

AFFIRMED

67	662
78	160
67	662
106	522

GOLDSMITH, ASSIGNEE, v. WILLSON ET AL.

1. **DETINUE: PRACTICE: NECESSITY OF PROVING THE VALUE OF EACH ARTICLE.** In an action for the recovery of specific personal property where the defendant retains the property, it is not necessary, in order to recover a judgment for the value of the property, that plaintiff show the value of each article. It is enough for such purpose to show the total value of the property wrongfully detained.
2. ———: ———: **FAILURE TO PROVE VENUE OF PROPERTY.** An action to recover specific personal property, brought in the county where the defendant resides, will not be defeated simply because of failure of the plaintiff to prove that the property is detained in that county, for, if it be conceded that, under § 3225 of the Code, the place of suit is determined by the location of the property, and not by the residence of the defendant, still the action may be prosecuted to judgment in the county of defendant's residence, unless he makes application for its removal to the proper county, under § 2589 of the Code.
3. ———: **RECOVERY OF MORTGAGED CHATTELS BY ASSIGNEE OF MORTGAGOR FROM ATTACHING CREDITORS.** The fact that specific personal property, sought to be recovered from attaching creditors by an assignee of the debtor, is under mortgage by the debtor,—the mortgage antedating both the assignment and the attachments—will not necessarily defeat a recovery, because, (1) in the absence of a showing to the contrary, the mortgage may provide for a right of possession by the mortgagor, (Code, § 1927,) which right the assignment would pass to the assignee; and, (2) even if that is not the case, the mortgagor (and his assignee under him) is entitled as against all the world, except the mortgagee, to the possession of the property; (*Evans v. St. Paul Harvester Works*, 63 Iowa, 204;) and the right of possession is the essence of the action.

Goldsmith, Assignee, v. Willson et al.

Appeal from Sac District Court.

MONDAY, DECEMBER 14.

ACTION for the recovery of specific personal property. On the ninth day of January, 1884, one George R. Davis executed and delivered to plaintiff an instrument which purports to be a general assignment of all his property for the benefit of his creditors. This instrument was filed for record on the day of its execution, and on the eighteenth of the same month plaintiff filed his bond as assignee. The defendant Willson is sheriff of Sac county, and on the day on which said assignment was executed he received a writ of attachment, which was issued in an action brought by M. Reigelman & Co. against said George R. Davis; and on the twelfth of said month he levied said attachment on a portion of a stock of goods in a store building in which Davis had carried on business as a merchant before the assignment to plaintiff. On the fifteenth of January, Kohn Bros. instituted a suit against Davis, in which they also sued out a writ of attachment, which was placed in Willson's hands for service, and was by him levied on the balance of the stock of goods in said store building. Plaintiff thereupon brought this suit against the sheriff for the recovery of the attached property, claiming possession under said deed of assignment. At the next term of the district court the attaching creditors appeared, and made application to be made parties defendant. This application was granted by the court, and they then filed separate answers, after which they moved for separate trials, and this motion was sustained. The issue between plaintiff and Reigelman & Co. was disposed of at that term, but Kohn Bros. files a motion for a continuance of the cause as to them, which was sustained, and the issue between them and plaintiff came on for trial at the next term. In their answer they allege that Davis, at the time he executed the deed of assignment under which plaintiff claims, and as part of the same

Goldsmith, Assignee, v. Willson et al.

transaction, also executed a chattel mortgage on said stock of goods to the Marion County National Bank, and that he intended thereby to give said bank a preference over his other creditors, and they say that for this reason said assignment is not an assignment for the benefit of all of the creditors in proportion to the amount of their claims, and that it is therefore void. They also allege that said assignment was executed by Davis, and accepted by plaintiff, with intent to hinder and delay and defraud the creditors of Davis. The answer also contains a general denial of the allegations of the petition. On the trial plaintiff introduced in evidence the deed of assignment and an inventory of the estate and a list of creditors, which had been filed in the office of the clerk of the district court; also his bond as assignee. He also introduced evidence tending to prove the value of the stock of goods in the aggregate; also the value of that portion of the stock which was seized on Reigelman & Co.'s attachment. But there was no evidence of the value of the specific articles constituting the stock. He also proved by the sheriff that he had had the stock of goods in his possession, and that plaintiff had served notice on him of his claim. Davis, the assignor, was one of the witnesses examined by plaintiff as to the value of the stock of goods, and on his cross-examination he admitted that on the second of January he executed a chattel mortgage to the Marion County National Bank on the stock of goods in question, to secure an indebtedness which he was owing to said bank. But the mortgage was not introduced in evidence. When plaintiff rested, defendants moved the court to direct the jury to return a verdict for them, which motion was sustained by the court, and judgment was entered on the verdict which was returned in obedience to this direction of the court. Plaintiff appeals.

Charles D. Goldsmith, appellant, *pro se*.

S. M. Ellwood and *Wright, Baldwin & Haldane*, for appellees.

Goldsmith, Assignee. v. Willson et al.

REED, J.—I. The grounds of the motion upon which the court directed the verdict for defendants are—*First*, that plaintiff had not proved the value of any article to recover possession of which this action was brought; *second*, plaintiff had not proved that the property described in his petition was unlawfully detained by defendant Willson in Sac county, or that it was so detained at the time of the commencement of the action; *third*, plaintiff's evidence shows that the title to and right of possession in the property in question were vested at the time of the commencement of the action in the Marion County National Bank.

1. **DEFINITE:** practice: necessity of proving the value of each article.
It is alleged in the petition that the value of the whole stock at the time the first attachment was levied was \$5,668.10, and that the value of that portion of it which was taken on Kohn Bros.' attachment was \$5,032.86. Attached to the petition is what is alleged to be an inventory of the stock, and opposite each item on the inventory is set out what is alleged to be its value; and the petition alleges that certain of the articles enumerated in the inventory were taken on the attachment of Reigelman & Co., and that all the other articles were taken on the writ sued out by Kohn Bros. As stated in the statement of the case, plaintiff introduced evidence from which the value in the aggregate of the goods taken on the Kohn Bros. attachment might have been determined, but gave no evidence of the value of the specific articles. The question raised by the first assignment of the motion is whether plaintiff is entitled to recover in this form of action without proving the value of the articles composing the stock of goods of which he seeks to obtain possession.

It is provided by section 3238 of the Code that the jury, in actions for the recovery of specific property, must determine the value of the property whenever by their verdict there will be a judgment for its recovery or return; and that, when required so to do by either party, they must find the value of each article. It is also provided by section 3239 that the

judgment shall determine which party is entitled to the possession of the property, and shall designate his rights therein and, if he have not the possession thereof, shall also determine the value of his right; and section 3241 provides that, if the party found to be entitled to the property be not already in possession thereof, he may, at his option, have execution for the specific delivery of the property, or for the value thereof as determined by the jury, and that, if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles. It is clear from these various provisions that the object of the statute, in requiring the aggregate value of the property to be determined by the jury, is to enable the court, by its judgment, to afford the party entitled to the property a complete remedy, in case it cannot be obtained on execution, or in case of his election to take execution for its value; and the object of requiring the jury to determine the value of the different articles is to afford the party entitled to the property a complete remedy, in case he elects to have execution for its delivery to him, and any of the articles cannot be obtained on execution.

Plaintiff was not in possession of the property at the time of the trial. He had not given the bond required by section 3229 of the Code, and no order had been issued by the clerk for its delivery to him. If the jury had found that he was entitled to the possession of the property, and had also found the aggregate value, he might have elected to take execution for that value; and in that case, the court could have entered such judgment on the verdict as would have afforded him perfect relief. The court did not know when it sustained the motion that he would not make this election, in case he succeeded in establishing his right to the property. He had no occasion to show the value of the different articles, unless he intended to take execution for the delivery of the property; and, as he introduced no evidence of their value, the reasonable presumption is that he did not intend to make that election.

Goldsmith, Assignee, v. Willson et al.

Defendants had the right under section 3238, if any interest of theirs would thereby be protected, to require the jury to find the value of the different articles; but such finding was clearly not essential to plaintiff's right of recovery.

II. The second ground of the motion was that plaintiff did not prove that the property was detained in Sac county.

2. —: —: It is alleged in the petition that defendant Willson detained the property in that county, but failure to prove venue of property. there was no direct evidence as to where it was situated when the suit was instituted. We are of the opinion, however, that the omission of plaintiff to prove this averment does not defeat his right of recovery. It is provided by section 3225 of the Code that "an action for the recovery of specific personal property may be brought in the county where the property, or some part thereof, is situated." It is shown by the pleadings that defendant Willson was sheriff of Sac county, and he is presumed to be a resident of that county; so that, if the action may be brought in the county of the defendant's residence, it was properly brought in Sac county. But let it be conceded that under section 3225 the place of bringing suit is determined by the situation of the property, and not the residence of the defendant. Defendants' remedy, however, if the action was brought in the wrong county, was to move to transfer it to the proper county; and, in case of their failure to make such application, it might be prosecuted to judgment in the county where brought. Code, § 2589.

III. The third ground of the motion was that the title to the property, and the right of possession, were transferred to the Marion County National Bank by the chattel mortgage given by Davis before the assignment, and that plaintiff could not, therefore, maintain an action for possession of it. To entitle plaintiff to recover in an action of this kind, it is not essential that he should have the legal title to the property, but he may recover on a naked right of possession. While the

3. —: re-covery of mortgaged chattels by assignee of mortgagor from attaching creditors.

Goldsmith, Assignee, v. Willson et al.

effect of a chattel mortgage may be to vest the legal title of the property in the mortgagee, the question whether the right of possession is in the mortgagor or mortgagee depends upon the terms of the instrument. It is provided in section 1927 of the Code that, "in the absence of stipulations to the contrary in the mortgage, the mortgagee of personal property is entitled to the possession thereof." It is therefore competent for the parties to stipulate in the mortgage that the right of possession shall remain in the mortgagor until the conditions of the mortgage are broken. There is no presumption, then, from the mere fact that a chattel mortgage has been given, that the mortgagor is divested of the right to the possession of the property covered by it; but the question whether he is divested of that right is determined by the stipulations contained in the instrument. As stated above, the chattel mortgage was not introduced in evidence. It was impossible, then, for the court to determine which of the parties to it was entitled to the possession of the property, and this consideration is conclusive as to this ground of the motion.

But if it should be conceded that the bank had the right under the mortgage to the possession of the property, it would not follow that plaintiff cannot maintain the action. The rights created by the mortgage exist only as between the parties to the instrument and those claiming under them. The mortgagor is not divested by the mortgage of all interest in the property. By the instrument he passes the legal title and right of possession to it to the mortgagee as a security for the debt; but he retains the right of redemption and the ownership until they are extinguished by the foreclosure of the mortgage. As against all the world, except the mortgagee, or those claiming under him, he is entitled to the possession of the property. The case in this respect does not differ in principle from *Evans v. St. Paul Harvester Works*, 63 Iowa, 204. The deed of assignment passed to plaintiff all interest in the property which remained in Davis after the execution of the mortgage. *Gim-*

Johnson v. Pennell et al.

ble v. Ferguson, 58 Iowa, 414. It is said by appellees, however, that, if the mortgagee has the right to the possession of the property, he may maintain an action for its recovery; and, consequently, if plaintiff can recover against them, they may be compelled to respond to both parties for the value of the goods. But, as is pointed out in *Evans v. St. Paul Harvester Works*, *supra*, they have it in their power to protect themselves against this double liability by having the mortgagee made a party to the proceeding and its rights determined by the judgment.

The district court erred in taking the case from the jury and directing the verdict for defendants, and the judgment will be

REVERSED.

JOHNSON V. PENNELL ET AL.

1. **Evidence: PAYEE OF NOTE AND MORTGAGE: PAROL TO CONTRADICT JUDGMENT.** Where a note and mortgage were put into judgment, but the judgment was silent as to the original payee of the note and mortgage, parol evidence that they were originally made to one not the judgment plaintiff was not a contradiction of the judgment record, and was properly admitted in this case.
2. —: **ACTION TO SET ASIDE CONVEYANCE AS FRAUDULENT: WHAT ADMISSIBLE UNDER GENERAL DENIAL.** Where it was sought to set aside a conveyance as fraudulent, and the answer was only a general denial, evidence which tended to prove that defendant acquired title to the premises under the foreclosure of a valid mortgage given to a third party for a valuable consideration, the title to which he (defendant) acquired by lawful means, was admissible, without any special plea of such facts, because it tended to negative allegations which plaintiff was bound to prove. Such facts did not constitute a special defense. Compare Code, § § 2704, 2718.
3. **Fraudulent Conveyance: INSUFFICIENT EVIDENCE.** The evidence in this case *held* insufficient to set aside a title to land on the ground that it was held in fraud of creditors.

67	669
108	43
67	669
128	583
67	669
131	42

Appeal from Clarke District Court.

MONDAY, DECEMBER 14.

PLAINTIFF is the owner of a judgment for \$1,352.98 and costs, obtained by the First National Bank of Osceola against the defendants Edson Pennell and C. G. Pennell. He brought this action to subject certain real estate, the title to which is alleged to be in defendant Charles R. Simmons, to the payment of said judgment, on the ground, as is alleged, that the Pennells are the actual owners of the property, and that the title thereto is held by Simmons in trust for them, and is so held for the purpose of fraudulently covering the property and preventing its appropriation for the payment of the debts of the Pennells. The district court dismissed the petition. Plaintiffs appeal.

W. M. Wilson, for appellant.

M. L. Temple, for appellees.

REED, J.—It is alleged in the petition that the Pennells were the owners of a large quantity of lands in Clarke county, the title to which was held by themselves, and that, being involved in debt, they entered into a corrupt agreement with Simmons, by which they agreed to execute to him a sham mortgage on the premises; and that, in pursuance of this agreement, they did execute and deliver to him a mortgage thereon, but that the same was made without any consideration, and was received by Simmons solely for the purpose of hindering and delaying the creditors of the Pennells in the collection of their debts; and that he (Simmons) subsequently instituted a suit for the foreclosure of said mortgage, and obtained judgment foreclosing the same, and an order for the sale of the mortgaged premises on special execution; that such execution was subsequently issued on said judgment, and the

premises were offered for sale thereon, and were bid in by Simmons at the amount of the judgment and costs, and the execution was returned satisfied, and after the expiration of the year for redemption a sheriff's deed was executed to Simmons, conveying the premises to him. The answer of the defendants is a general denial of all the allegations of the petition.

I. Plaintiff introduced in evidence a deed from John M. Gregg, conveying the land in question to defendant C. G.

Pennell, also a record of the judgment rendered in the circuit court in an action wherein the defendant Charles R. Simmons was plaintiff and C. G. Pennell and Charles E. L. Wilder were

defendants. By this decree the plaintiff therein recovered judgment against C. G. Pennell for \$4,222.20, and the costs of the action. It also foreclosed a mortgage on the premises in question given to secure the indebtedness, and establishes the same as a superior lien on said premises to the lien or interest therein of the defendant Wilder. He also introduced the judgment docket, the sale-book and a sheriff's deed, showing the issuance of a special execution on said judgment, a sale of the property thereunder to Simmons, and a subsequent conveyance of it to him by the sheriff. Neither the note or mortgage on which the judgment was rendered, nor the pleadings in the case, were introduced in evidence, and there is nothing in the recitals of the judgment indicating to whom the note and mortgage were originally executed. Plaintiff proved that no mortgage from Pennell to Simmons was recorded in the office of the recorder of deeds of the county. He also introduced evidence tending to prove that Simmons' circumstances were such that it is impossible that he should have advanced to Pennell the amount of money for which the judgment was rendered. Simmons introduced evidence which tends to prove that the note and mortgage on which the judgment was rendered were given by Pennell to Gregg to secure a portion of the purchase price of the land, and that they

1. EVIDENCE:
payee of note
and mort-
gage: parol
to contradict
judgment.

Johnson v. Pennell et al.

were subsequently purchased of Gregg by Simmons' mother, who gave them to him. Plaintiff objected to the introduction of this evidence on the grounds of incompetency and irrelevancy, and counsel insists on these objections in this court. He contends that the evidence is incompetent because it tends to contradict the record of the judgment, his position being that the record is conclusive evidence that the judgment was rendered on a note and mortgage given by Pennell to Simmons. But, as is stated above, the record is silent on the question as to who was the payee of the note. It therefore proves nothing, except that Simmons at the time of its rendition held the title to the note and mortgage on which it was rendered. The evidence objected to, then, has no tendency to contradict the record. It simply tends to prove a fact which is not shown by the judgment record, viz., the identity of the note and mortgage upon which the judgment was rendered; and we think it competent for that purpose.

It is next contended that the evidence is not relevant to any issue made by the pleadings. As stated above, the answer was a mere denial of the allegations of the petition. No affirmative defense was pleaded, and appellant's position is that the facts which the evidence tends to prove would, if proven, constitute a special defense to plaintiff's claim, and that, under the provisions of section 2718 of the Code, they cannot be given in evidence without having been specially pleaded. We think, however, that the evidence does not tend to establish a special defense, but that it tends rather to disprove the facts which, under the issue, plaintiff was bound to prove. Plaintiff's allegation is that defendant Simmons obtained the title to the land by purchase at sheriff's sale under the foreclosure of a mortgage which Pennell had given to him, and that this mortgage was given without consideration, in pursuance of a corrupt agreement between the parties thereby to cover the property and place it beyond the reach of Pennell's creditors. Under the issue, he was bound

2. —: action to set aside conveyance as fraudulent: what admissible under general denial.

to establish these facts. He introduced evidence which tends to prove them, and which he claims is sufficient, if uncontradicted, to establish them. The evidence objected to certainly tends to disprove the facts which plaintiff was required to establish. It tends to prove that defendant acquired title to the premises under the foreclosure of a valid mortgage given to a third party for a valuable consideration, the title to which he acquired by lawful means.

It is provided by section 2704 of the Code that "under a denial of an allegation no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove." We think the evidence is admissible under this rule. It is insisted, however, that defendant's answer is a denial that he has title to the premises, while the evidence tends to prove that he holds it by a valid title, and that it is irrelevant for that reason. When fairly considered, however, the answer amounts to no more than a denial by defendant that he acquired the title in the manner and by the means charged in the petition.

II. We come now to the merits of the controversy. The evidence shows, without any doubt, that the mortgage, which was foreclosed by the judgment of the circuit court in the case of *Simmons v. C. G. Pennell and Wilder*, was given by Pennell to Gregg to secure a portion of the purchase price of the land which was sold by Gregg to Pennell. It is also proven by the testimony of Gregg, who is a disinterested and creditable witness, that Mrs. Simmons, the mother of defendant, after the maturity of the note paid him the amount then due thereon, and that he indorsed the note and delivered it and the mortgage to her, and that no portion of the debt evidenced by the note was ever paid to him by Pennell. It is apparent, therefore, that plaintiff must establish, before he can recover, either that Mrs. Simmons in the transaction with Gregg was acting as the agent of Pennell, and that the money she paid to Gregg belonged to Pennell, or that Pennell had paid the debt evi-

3. FRAUDU-
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Council Bluffs Lodge No. 49, I. O. O. F., v. Billups et al.

denced by the note since its transfer by Gregg to Mrs. Simmons. We do not deem it necessary to set out in this opinion the evidence relied on by plaintiff. It is sufficient to say that, in our judgment, it entirely fails to establish either of said facts.

We think, therefore, the case was rightly determined by the district court, and the judgment will be

AFFIRMED.

COUNCIL BLUFFS LODGE No. 49, I. O. O. F., v. BILLUPS
ET AL.

1. **Mortgage: NOTICE OF SENIOR BUT UNRECORDED MORTGAGE: NEW MORTGAGE TO CORRECT MISTAKE IN SENIOR MORTGAGE: PRIORITY.** Where a mortgagee has notice of a first but unrecorded mortgage, which is recited in his mortgage as being a first lien, he cannot claim that his mortgage takes precedence of a new mortgage, executed and recorded after his mortgage, to correct a mistake in the description of the property in the first mortgage.
2. **Evidence: INADMISSIBLE UNDER ISSUES: OBJECTION TOO LATE ON APPEAL.** Where evidence which is material to the real controversy between the parties, but which is not admissible under the issues as made by the pleadings, is admitted without objection in the lower court, it can not be objected to for the first time in this court.

Appeal from Pottawattamie Circuit Court.

TUESDAY, DECEMBER 15.

ACTION to foreclose a mortgage. There was a decree for the plaintiff, and the defendant Beno appeals.

Wright, Baldwin & Haldane, for appellant.

D. C. Bloomer, for appellee.

ROTHROCK, J.—The defendants Rhoda Billups and J. P. Billups executed two mortgages upon a lot in the city of

Council Bluffs. One of these mortgages was made to the plaintiff, and the other to the defendant Beno. This action was brought by the plaintiff to foreclose its mortgage. Beno was made a party, and it was claimed by the plaintiff that its mortgage was prior and superior to that of Beno. Beno disputed this claim. The makers of the mortgages made no defense, and the issue tried in the court below, and presented to this court, involves the question as to which mortgage takes priority over the other. The facts, as disclosed by the record, are that a mortgage to the plaintiff was executed on the twenty-seventh day of November, 1883, and left in the custody of Hon. D. C. Bloomer. In the Month of December of the same year the defendant Beno called on Bloomer, and informed him that the Billups wished to borrow money on the lot on which the Odd Fellows had a mortgage. He inquired the amount of the plaintiff's mortgage, and asked for a description of the lot, saying that he thought the lot would be good for \$300 more. A mortgage was made out to Beno in Bloomer's office, and the matter was talked over, and it was fully understood by Beno that the plaintiff held a mortgage upon the lot, which was the first lien. The mortgage to Beno recited that the plaintiff's mortgage was first and Beno's second, and that the premises were clear of encumbrance, excepting a mortgage to the plaintiff. The mortgage to Beno was executed on the twenty-sixth day of December, 1883, and filed for record on the next day. Sometime afterward Bloomer discovered that the plaintiff's mortgage did not correctly describe the lot intended to be mortgaged. Bloomer then procured the makers of the mortgage to execute a new one, in which the property was correctly described, and it was dated back to November 27, 1883, the date of the first mortgage. This substituted mortgage was made on the sixth day of May, 1884, and it was filed for record on the next day.

The petition of the plaintiff declares upon its last or substituted mortgage. It is not alleged in the petition that the

Wood v. Whisler.

plaintiff's mortgage is superior to that of the defendant on the ground that the defendant had notice that the first mortgage was intended by the parties to be a lien upon the lot owned by the mortgagors. That Beno had such notice is not disputed. He cannot be allowed to claim that he did not have such notice, because his own mortgage expressly provides that the plaintiff's mortgage is the superior lien. Counsel for appellant claim that the evidence showing that Beno had notice is inadmissible under the issue as made by the pleadings. We think this objection should have been made upon the trial in the circuit court. It ought not to be allowed to be interposed for the first time upon appeal in this court. It was competent evidence as determining the rights of the contending parties as to the priority of the mortgages, and, if objection had been made to it, the plaintiff could have at once amended the petition. No objection having been made, the plaintiff was warranted in believing that the defendant was content to try the real controversy between the parties without insisting on technical accuracy in the pleadings.

AFFIRMED.

87 876
106 436

WOOD v. WHISLER.

1. **Promissory Note:** INTEREST: WHETHER PAYABLE ANNUALLY OR NOT: CONSTRUCTION. The notes declared on bore interest at the rate of 7 per cent per annum, and each contained the following clause: "If interest thereon is not promptly paid annually, the same becomes a part of the principal, and shall bear the same rate of interest." *Held* that it was optional with the maker whether he would pay the interest annually or not, and that no action on the notes could be maintained until the principal was due.

Appeal from Fremont Circuit Court.

TUESDAY, DECEMBER 15.

ACTION to foreclose a mortgage. A demurrer to the petition, on the ground that it does not show that the debt secured by the mortgage is due, was sustained. Plaintiff appeals.

W. P. Ferguson, for appellant.

James McCabe, for appellee.

BECK, CH. J.—The mortgage was executed to secure two promissory notes each dated in August, 1883, one due in 1887, and the other in 1888. By their terms they draw interest at the rate of seven per cent per annum, and each contains a condition in the following language: "And if interest thereon is not promptly paid annually, the same becomes a part of the principal, and shall bear the same rate of interest." The mortgage contains the following condition: "And it is further agreed, if default shall be made in the payment of said sums of money, or any part thereof, principal or interest, * * * then the whole amount of the indebtedness to become due." The petition alleges that a year's interest is due and unpaid, and that, by reason of default in payment of the interest at the end of the year, the whole debt, with interest, becomes collectible. The demurrer assails the petition on the ground that it does not show that the debt, or any part thereof, is due. We think the demurrer was rightly sustained. Neither the notes nor mortgage provide for the payment of interest annually. They simply provide that in case it is not so paid it shall draw interest; thus leaving it optional with the defendant to pay the interest at the end of each year. The instrument will bear no other construction, and the case therefore demands no further consideration.

AFFIRMED.

Farmer v. Hoffman, Judge, etc.—Sawyer v. Brossart et al.

FARMER V. HOFFMAN, JUDGE, ETC.

1. **Constitutional Law: PROCEEDINGS AUXILIARY TO EXECUTION: IMPRISONMENT FOR CONTEMPT.** *Eikenberry v. Edwards, ante*, p. 619, followed.

TUESDAY, DECEMBER 15.

CERTIORARI. This is an original proceeding in this court, the object of which is to review an order made whereby the plaintiff was adjudged guilty of a contempt.

Cook & Patterson, for plaintiff.

Winslow & Varnum, for defendant.

SEEVERS, J.—The facts in this case are substantially the same as in *Eikenberry v. Edwards, ante*, p. 619, decided at the present term, and therefore the judgment of the circuit court must be

AFFIRMED.

SAWYER V. BROSSART ET AL.

1. **Sale of Land: OFFER BY LETTER: ACCEPTANCE MUST BE IN TERMS OF OFFER: ILLUSTRATION.** B., a resident of California, by letter addressed to plaintiff at his place of residence in Iowa, offered to sell certain real estate to plaintiff for \$5,000. Plaintiff telegraphed that he would take the property at that price, and added: "Money at your order at First National Bank here. Telegraph me immediately when to expect deed." *Held* that B. was entitled under his offer to have the money paid to him at his place of residence, and to deliver the deed there, and that, as the acceptance of plaintiff was not an acceptance of the offer as made, it did not bind B., and specific performance could not be enforced.

676 678
112 281

67 678
116 377

Appeal from Johnson District Court.

TUESDAY, DECEMBER 15.

THIS is an action to enforce the specific performance of an alleged contract for the purchase of certain real estate, or for the recovery of damages for failure to perform, if it be found that the title of the property cannot be conveyed to the plaintiff. The cause being in equity, a trial was had to the court, and a decree was entered for the defendants. Plaintiff appeals.

C. S. Ranck and S. H. Fairall, for appellant.

Boal & Jackson, for appellees.

ROTHROCK, J.—The defendant John F. Brossart, a resident of Los Angeles, California, was the owner of the property in controversy, consisting of two business rooms in Iowa City. On the twenty-first day of September, 1883, a letter was received by the plaintiff from Brossart, the material part of which is as follows: "Yours at hand. You can have that building for thirty-five hundred dollars, or the two for \$5,000. Let me hear from you at once." On the next morning the plaintiff sent the following telegram:

"IOWA CITY, Iowa, September 21, 1883.

"*John F. Brossart, Los Angeles, California:* Accept your offer for two buildings at five thousand dollars. Money at your order at first National Bank here. Telegraph me immediately when to expect deed.

"D. F. SAWYER."

On the afternoon of the twenty-first day of September a contract of sale was made of one of said business rooms by Messrs. Boal & Jackson to the defendant Noel, at an agreed price of \$5,000, said Boal & Jackson claiming to be agents of Brossart and authorized to make the sale. Said agents also sent Brossart a telegram, advising him of the sale they

Sawyer v. Brossart et al.

had made. Both of said telegrams were received by Brossart at the same time. He conveyed the property to Noel in accord with the contract made by Boal & Jackson. The plaintiff claims that his acceptance of the offer by telegram was binding upon Brossart, and that the contract was complete from the date of such acceptance. It is also claimed that Boal & Jackson were not authorized by Brossart to make a sale of the property; and it is charged that Noel acted in bad faith, and fraudulently interfered and prevented the plaintiff from closing up the purchase. We do not think said claims are well founded. Noel had the same right to purchase this property that the plaintiff had, and if he succeeded in making a valid purchase he only prevented the plaintiff from purchasing the property at much less than its value, as the evidence shows.

When Brossart learned that he had offered the property at less than its value, or in any state of the case, it was his right to stand upon a strict acceptance of his offer. We do not think it is material to inquire whether Boal & Jackson had authority to make a valid sale. We think that Brossart was not bound to comply with the acceptance of plaintiff, because it was not an acceptance of the offer. It was coupled with a condition with which Brossart was not required to comply. It was Sawyer's duty to pay the money to Brossart. It was a direct offer, and required an acceptance in the terms of the offer. Brossart made no reply to the telegram from plaintiff. It was his right to ignore it by silence; and all the evidence shows that from that time he treated the negotiations as at an end. Brossart's offer entitled him to have the money paid to him at Los Angeles and to deliver the deed there. The conclusion we reach finds support in the following cases: *Northwestern Iron Co. v. Meade*, 21 Wis., 474; *Baker v. Holt*, 56 Id., 100; S. C., 14 N. W. Rep., 8; 1 Pars. Cont. (6th Ed.), 475.

AFFIRMED.

THE CITY OF BURLINGTON V. PALMER.

1. **Cities and Towns: PAVED STREET TORN UP IN CONSTRUCTING SEWER: COST OF REPAIRING.** Where a street has been paved at the expense of the owners of abutting property, (Code, § 466,) and the pavement has been torn up in the construction of a sewer, it cannot be repaved at the expense of the abutting property owners, but restoring the pavement must be accounted as part of the work of constructing the sewer, and the expense thereof must be paid out of the general fund of the city. (Code, § 465.)
2. ———: **ACTION TO COLLECT SPECIAL TAX: NO COUNTER-CLAIM ALLOWED.** The defendant in an action brought by a city to collect a special tax cannot set up a counter-claim against the city; for the effect of a recovery on such counter-claim would be to divert the tax from its special purpose, which the law will not permit.

Appeal from Des Moines Circuit Court.

TUESDAY, DECEMBER 15.

ACTION to recover a special tax assessed for macadamizing a street. There was a judgment in the circuit court for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

Hedge & Blythe, Newman & Blake and J. C. Powers,
for appellant.

A. M. Antrobus and J. J. Seerley, for appellee.

BECK. CH. J.—I. The facts disclosed by the pleadings and evidence upon which plaintiff bases its right to recover in this action are these: The city, for the purpose of changing the course of a creek crossing Valley street, caused a double sewer to be constructed from the creek down that street to the river, thus conducting the water of the creek to the river through the sewer. Valley street, before the work was commenced, was in good condition, having been before well macadamized. In order to construct the sewer, it

The City of Burlington v. Palmer.

became necessary to take up the macadamizing of the street, except the parts adjacent to the pavements and gutters, of the width of about six feet. After the completion of the sewers, the city proceeded to again macadamize the street. But, a different plan for the work being adopted, it became necessary, in order to carry it out, to take up the strips of old work not before removed. There was therefore a wholly new macadam pavement constructed upon all the parts of the street along which the sewer was built. A levy of a special tax upon the abutting property to pay for the cost of the new macadamizing was made by the unanimous vote of the city council. See Code, § 466. To collect this tax the action before us was brought. The defendant pleaded a counterclaim for injury sustained by reason of the negligent and improper prosecution of the work. A demurrer to this defense was sustained. The defendant insisted in the court below that plaintiff is not authorized by the statute to make a special assessment upon the abutting property to pay for the work; that it was the duty of the city to restore the street to as good condition as it was before the work commenced, paying therefor, out of the general revenue of the city, the cost thereof, being a part of the expense of constructing the sewer, which is by law paid out of the general revenue of the city. Code, § 465. The question presented by this position of defendant was raised by a demurrer to plaintiff's reply to defendant's answer. It was and is a controlling question in the case.

II. It will be observed that two questions are in the case, which, stated in logical order, are as follows: (1) Has the city authority to levy an assessment upon abutting lots to replace good and sufficient macadamizing removed and destroyed by it in constructing the sewer, the new macadamizing being of a character different from the old work? (2) May the defendant, in an action for the recovery of a special assessment for the improvement of a street, plead a counterclaim?

III. Code, § 465, declares that cities and towns "shall have power to provide for the grading and repairs of any street, avenue or alley, and the construction of sewers, and shall defray the expenses of the same out of the general funds of such city or town."

1. CITIES and towns: paved street torn up in constructing sewer: cost of repairing.

Section 466 declares that these municipalities "shall have power to construct sidewalks, curb, pave, gravel, macadamize and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley, to pay the expenses of such improvement." It is plain that the macadamizing for which the assessment in question is made was not done for the repair of the street. Its expense, therefore, could not have been paid out of the general funds of the city on the ground that the work was done for repairs. But section 465 provides that all expenses of the construction of sewers shall be paid out of the general funds. It appears to us that the cost of macadamizing to take the place of the works destroyed in building the sewer pertains to the expense of the sewer. The city surely could not for any purpose destroy and remove the macadamizing of the street, and escape from the obligation of restoring it. If, in making a sewer, it becomes necessary to do so, the city should restore the street to its prior condition, and it is plain that the cost of such restoration is a part of the expense of making the sewer. No obligation under section 466 rests upon the owners of abutting property to pay for such restoration, which is a very different thing from the new macadamizing upon streets not before improved in that way. The owners of abutting lots may be charged with the cost of macadamizing streets, but the statute does not provide that this burden shall be repeated whenever the city may destroy the work done for the improvement of the street. These conclusions are not only in harmony with reason, but reach just results.

IV. The other question in the case involves the right of defendant to set up a counter-claim in an action brought by a

The City of Burlington v. Palmer.

2. ——— : ac-
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special tax :
no counter-
claim allow-
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city to recover a special tax. In our opinion, it cannot be done. The tax is levied in the exercise of governmental authority conferred by the state upon the city, and is to be expended for special purpose demanded by the wants of the public. Surely the tax-payer has no right to divert the revenue raised by the tax to purposes other than those for which it was levied. Did he possess such authority, the public would be deprived of benefits which municipal governments are intended to promote. If a tax levied to macadamize a street may be diverted to the liquidation of damages sustained by the tax-payer by reason of the negligent performance of the work, it is plain that the revenue might be appropriated to a purpose other than that prescribed by law. But this the courts will not permit. The tax is set apart for the improvement,—it cannot be disbursed for other purposes. Defendant's claim for damages is to be paid out of the general fund of the city. If he may plead it as a counter-claim, the special fund would be devoted to general purposes. This the law will not permit. We conclude, therefore, that, in an action of this character, a counter-claim cannot be pleaded. This conclusion is supported by these authorities: *Whiting v. City of Boston*, 106 Mass., 89; *Himmelman v. Spanagel*, 39 Cal., 389; *Cooley, Tax'n*, 13; *Dill, Mun. Corp.*, § 810.

V. It will be observed that under our ruling the tax involved in this case cannot be recovered. This is not inconsistent with our conclusion that a counter-claim cannot be pleaded in the action. We hold that such a defense cannot be set up to an action to collect a special tax. Though no recovery of the tax may be had, yet the counter-claim cannot be pleaded, for the reason that the law does not permit such a defense in actions or proceedings to enforce the collection of taxes. The judgment of the circuit court is reversed, and the cause is remanded for a judgment in harmony with this opinion.

REVERSED.

BYERS V. HARRIS ET AL.

1. **Promissory Note: EXTENSION OF TIME: RELEASE OF SURETY.** A promise made by the holder of a note to the principal maker, without any consideration to support it, to extend the time of payment for one year, is not a contract binding upon the holder, and will not operate to discharge a surety who does not consent to the extension of time.
2. **Consideration for Written Contract Presumed: PRESUMPTION NOT CONCLUSIVE.** A written contract is presumed to be founded upon a consideration, but the presumption may be rebutted by evidence.
3. **Practice: RELIANCE ON DEFENSE NOT PLEADED: OBJECTION TOO LATE ON APPEAL.** An objection that a defense relied on was not pleaded cannot be raised for the first time in this court.

67	685
118	742
67	685
d139	351

Appeal from Mills District Court.

MONDAY, DECEMBER 15.

ACTION upon a promissory note, tried to the court without a jury, and judgment was rendered for plaintiff. Defendant appeals.

Lewis & Young and Stone & Gilliland, for appellants.

Watkins, Williams & Wright, for appellee.

BROCK, CH. J.—I. The only defense pleaded to the action is that plaintiff entered into an agreement to extend the time of the payment of the note for one year, and two of the defendants, who are sureties upon the note, in a separate answer allege that the principal, after such extension, became insolvent. This defense is supported by certain letters which passed between the plaintiff and the principal in the note, wherein he asked plaintiff whether she would permit him "to keep the money longer." In reply, she informed him that she would permit the note to run another year. The letters show no proposition on the part of defendant to pay any consideration for extending the time of pay-

Byers v. Harris et al.

ment of the note, and plaintiff in her reply demands none. There is no evidence of any consideration of any character paid by defendant, and plaintiff testified positively that there was none. Her evidence is not contradicted.

II. As there was no consideration for the extension of the time of payment of the note, plaintiff's agreement to that effect was not binding upon her. There was no contract for an extension of time which the law will recognize. The familiar rules upon which these conclusions are based are admitted by all. The action was properly brought upon the note before the expiration of the time of the alleged extension of payment, and the sureties were not discharged.

III. Counsel for defendants insist that the extension of the time of payment of the note is a valuable consideration, and will support a contract. This proposition is true, but it is not applicable to the case, for the reason that the principal in the note made no promise or contract to pay anything for the extension. If he had promised to pay a sum for the extension, the consideration therefor would have been found in plaintiff's agreement to extend the time for payment of the note. But no such promise was made by defendant. It is insisted that the contract, being in writing, imports a consideration. Code, § 2113. But this presumption may be overcome by evidence, which was done upon the trial.

IV. It is insisted that as the want of consideration was not pleaded by plaintiff it cannot be relied upon as a defense. If there is anything in the objection, it cannot be urged in this court, for the reason that it was not made in the court below.

The judgment of the district court is

AFFIRMED.

MCGREW v. DOWNS.

67	687
101	213

1. **Practice: TIME FOR APPEARANCE OF DEFENDANT: POWER OF COURT TO FIX BY RULE.** Under § 180 of the Code, the district and circuit courts have power to make a rule requiring defendants, when so notified, to appear and plead by noon of the first day of the term, notwithstanding § 2599 of the Code, and that, upon failing so to do, default will be entered against them.
2. **Judgment by Default: ON WHAT TERMS SET ASIDE: AFFIDAVIT OF MERITS.** A judgment by default cannot be set aside without an affidavit of merits on the part of the defendant. (Code, § 2871.) But such an affidavit must set out the facts constituting the defense, and not the affiant's mere conclusion that he has a good defense. See authorities cited in opinion.

Appeal from Pottawattamie District Court.

TUESDAY, DECEMBER 15.

PLAINTIFF brought this action against the defendant to recover damages for an alleged assault and battery. By the original notice defendant was cited to appear and defend before noon of the first day of the next term of the district court. On the first day of the term counsel entered an appearance for defendant, and announced that he would file an answer in the cause on the next morning. After this, and on the same day, counsel for plaintiff claimed a default, and the court entered a default against defendant. Four days after the default was entered defendant filed a motion to set it aside. This motion was overruled, and from this order defendant appeals.

G. A. Holmes, for appellant.

John P. Organ and *C. R. & E. H. Scott*, for appellee.

REED, J.—In citing the defendant to appear and defend on the first day of the term, plaintiff proceeded under the

1. PRACTICE: time for appearance of defendant: power of court to fix by rule. following rule, which had been adopted by the judges of the district and circuit courts of the Thirteenth judicial district: "Rule 1. In all cases the plaintiff may inform the defendant in the original notice that unless he appear thereto and defend before noon of the first day of the term at which he is required to appear, default will be entered against him; and when the defendant is served with such notice he shall demur or answer, or do both, as to the original petition before noon of the first day of the next term."

I. It is contended that this rule is not authorized by statute, and hence that, as the statute (Code, § 2599) provides that the defendant shall be cited by the original notice to appear and defend before noon of the second day of the term, he cannot be adjudged to be in default before the second day. Section 180 of the Code provides that "the judges of the district and circuit courts in any district may provide by general rule (1) that the time of filing pleadings or motions shall be other than provided in this Code; (2) that issues in all or a part of the counties in such district shall be made up in vacation; * * * (4) adopting such other rules as they may deem expedient, not inconsistent with this Code." It is very clear, we think, that the power to adopt the rule in question is conferred by this section.

II. "Default may be set aside on such terms as the court may deem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits be filed and a reasonable excuse shown for having made such default." Code, § 2871. This provision contemplates that the party shall set forth in his affidavit a statement of the facts constituting his defense. This was not done by the defendant in this case. He stated in general terms, however, that he had a good defense to plaintiff's claim. But this is no more than the expression by him of the opinion that he had a good

2. JUDGMENT by default: on what terms set aside: affidavit of merits.

Van Horn v. Redmon et al.

defense. This court has frequently held that this is not a compliance with the requirement of the statute. *Jæger v. Evans*, 46 Iowa, 188; *King v. Stewart*, 48 Id., 334.

The district court was justified on this ground in overruling the motion.

AFFIRMED.

VAN HORN V. REDMON ET AL.

1. **New Trial: MOTION FOR: AMENDMENT MORE THAN THREE DAYS AFTER VERDICT: NEWLY-DISCOVERED EVIDENCE.** Section 2838 of the Code does not require that a motion for a new trial on the ground of newly-discovered evidence be filed within three days after verdict, and where a motion on other grounds was duly filed within that time, *held* that an amendment on the ground of newly-discovered evidence might properly be filed later.

Appeal from Montgomery District Court.

TUESDAY, DECEMBER 15.

THIS is a controversy involving the ownership of two colts. The form of the action is replevin. There was a trial by jury, and a verdict and judgment for the defendants. Plaintiff appeals.

W. H. Redmon and *W. S. Strawn*, for appellant.

Junkin & Deemer, for appellees.

ROTHROCK, J.—It appears from the record in the case that the colts in question were once owned by one Wesley Hall. At the time he became the owner of the property he resided with one C. H. Hall. Wesley Hall left the residence of C. H. Hall, and the colts were in a pasture upon a part of the plaintiff's father's farm, which was in the possession of one Fryer. Wesley Hall was working for the plaintiff's father.

The plaintiff claims that he bought the colts of Wesley Hall and paid him the contract price therefor. He took possession of them, and put them in a pasture belonging to and in the possession of his father. The fence was broken down and the colts taken away by C. H. Hall and the defendant Overman, and others, under the claim made by C. H. Hall that he was the owner, having purchased them from Wesley Hall before the alleged purchase by the plaintiff. The plaintiff sued out a search-warrant, and the colts were taken possession of by virtue of the warrant by the defendant Redmon, who is a constable. The plaintiff then commenced this action in replevin against Redmon. The defendant Overman intervened in the action, and claimed that he was the owner of the colts by purchase from C. H. Hall, and the issue presented for trial was whether the plaintiff or Overman was the owner of the property. Overman does not claim by any other right than that acquired from C. H. Hall. No question of innocent purchaser without notice arises in the case, and the evidence was directed to the validity of the alleged purchase made by the plaintiff and that made by C. H. Hall. There was direct evidence supporting the claim of each party. The alleged purchase by C. H. Hall was prior in point of time to that of the plaintiff, and the plaintiff endeavored to prove that no purchase whatever was made by Hall.

The verdict in the case was returned on the second day of April, 1884, and on the fifth day of the same month the plaintiff filed a motion for a new trial, setting forth a number of grounds therefor. Two days thereafter the plaintiff filed an amendment to his motion for a new trial, setting up the additional ground of newly-discovered evidence. This amendment was supported by a number of affidavits in which the affiants state facts in the nature of statements made by C. H. Hall, which, if true, show quite conclusively that the claim made by him that he purchased the colts was a fictitious pretense. There are also the affidavits of plaintiff and his counsel, which, we think, show that there was no lack of

Goodnow v. Litchfield.

diligence in failing to discover the evidence before verdict. We need not set out the evidence, nor the showing of diligence, in detail. We think the court should have ordered a new trial upon this ground.

A question is made by counsel for appellees to the effect that the amendment to the motion for a new trial was properly overruled because it was not filed within three days after verdict, as required by section 2838 of the Code. The ready answer to the point made is that the cited statute does not require a motion for new trial upon the ground of newly-discovered evidence to be filed within three days. The record shows that the amendment was filed and disposed of during the term.

It is proper to say that we make no disposition of any other question in this case. The appellees filed an additional abstract, and there is a dispute between counsel as to whether it was served upon counsel for appellant. But the record upon the question above discussed is not a subject of controversy between the parties. For the error in overruling the motion for a new trial the judgment will be

REVERSED.

GOODNOW V. LITCHFIELD. (Two Cases.)

1. **Taxes: PAYMENT IN GOOD FAITH ON ANOTHER'S LAND: RECOVERY.** Where one, not officiously, but in good faith, relying upon a belief that he has a good title to the lands, pays the taxes thereon, but the title is subsequently adjudged to be in another, he may recover of the owner of the lands the amount of taxes so paid, with six per cent per annum interest on each payment.
2. **Public Lands: DES MOINES RIVER GRANT ABOVE RACCOON FORKS: WHEN LANDS BECAME TAXABLE.** The lands covered by the Des Moines river grant, and lying above the Raccoon forks, were taxable for the year 1861. *Goodnow v. Wells, ante, p. 654, followed.*
3. **Pleading: SETTING FORTH CHARACTER OF PLAINTIFF AS TRUSTEE OF EXPRESS TRUST.** Where it plainly appeared from the petition that

Goodnow v. Litchfield.

plaintiff sued as the trustee of an express trust, and that he was specially authorized to bring and maintain the suit in his own name, *held* that the petition was sufficiently specific as to that.

4. **Removal of Cause to Federal Court: TRUSTEE AS PLAINTIFF: CITIZENSHIP OF BENEFICIARY NOT CONSIDERED.** Where a trustee, invested by assignment with the title to the claim in suit, and authorized to prosecute it, is plaintiff, and a citizen of the same state with the defendant, the cause will not be removed to the federal courts on the ground that the person beneficially interested is a citizen of another state. *Vimont v. Chicago & N. W. R'y Co.*, 64 Iowa, 513, followed.
5. **Notary Public: SEAL OF FOREIGN NOTARY: PRESUMPTION AS TO CONTENTS OF.** In the absence of evidence to the contrary, it will be presumed that the laws of another state are similar to those of Iowa, and that they require notaries public to use a seal similar to that required to be used by notaries in this state.
6. **Practice in Supreme Court: PRESUMPTION AS TO EVIDENCE ON MOTION FOR CHANGE OF VENUE.** In the absence of a contrary showing, it will be presumed that the court below acted upon sufficient evidence in allowing a change of venue; and, though no such evidence is found in an abstract purporting to contain *all* the evidence, yet such presumption will be entertained, for the abstract must be supposed to refer only to the evidence taken on the trial subsequent to the change of venue.
7. **Notary Public: JURISDICTION: PRESUMPTION IN FAVOR OF.** An affidavit bore the caption "State of Iowa, County of Webster," but appeared to have been sworn to before a notary public in Dubuque county. *Held* that it must be presumed, in the absence of other evidence, that the notary took the affidavit within his own county.

Appeal from Webster District Court.

TUESDAY, DECEMBER 15.

THESE cases involve claims for reimbursement for taxes paid upon certain lands in Webster county. There were judgments for the plaintiff, and the defendants appeal.

O. H. Gatch, for appellants.

George Crane, for appellee.

ROTHROCK, J.—I. The questions in these cases are sub-

stantially the same, and require but one opinion for their determination. They are in many respects similar to cases already determined by this court involving the right to recover for taxes paid on what is known as the Des Moines river lands.

The whole controversy is just this: The lands above what is known as the "Raccoon fork of the Des Moines river" were for a long time in controversy between what is known as the "River Grant" and the "Railroad Grant." The claimants under the river grant finally recovered the lands. Pending the various contests as to the title to the lands, the claimants under the railroad grant paid large sums of money in the discharge of taxes upon the lands. They claim that, inasmuch as the claimants under the river grant succeeded in obtaining the lands, they ought to pay the taxes thereon; or, what is the same thing, they ought to reimburse the claimants under the railroad grant for what they have paid. This court has been of that opinion, and in many cases which we have determined arising out of these matters we have determined that the taxes were not officiously paid by the plaintiffs or their assignors, but that the payments were made in good faith, and ought to be repaid, with six per cent per annum interest from the time of the respective payments. The payments in these cases are for taxes for the years 1861, 1862 and 1863.

It is urged that the lands were not taxable for year 1861. We had occasion to examine this question in the case of *Goodnow v. Wells*, ante, p. 654, decided at the present term, and we there held that the lands were taxable for that year, and with that decision we are content.

II. The defendant moved to require the plaintiff to make his petitions more specific, and the motions were overruled.

The petitions show that the plaintiff sues as the assignee of the Dubuque & Sioux City Railroad Company. The assignment was in writing, and the same is exhibited with the petitions, and

1. TAXES: payment in good faith on another's land: recovery.

2. PUBLIC lands: Des Moines River grant above Raccoon Forks: when lands became taxable.

3. PLEADING: setting forth character of plaintiff as trustee of express trust.

Goodnow v. Litchfield.

made part thereof. It plainly appears from the petition that the plaintiff sued as trustee of an express trust, and he was specially authorized to bring and maintain suits in his own name to recover the taxes in question. We think the petitions were sufficiently specific.

III. The defendants filed petitions for the removal of the causes to the circuit court of the United States. They alleged that they were citizens of the state of New York, and "that the plaintiff, Goodnow, is only a nominal party to the suits, and has no interest therein whatsoever, but is prosecuting the same for the sole and exclusive use and benefit of the Dubuque & Sioux City Railroad Company, which was at the commencement of the suits and still is a corporation under and by virtue of the laws of the state of Iowa, and having its principal place of business in said state of Iowa, which said railroad company directed the commencement of said suit, employed counsel to prosecute the same, and are directing and controlling the prosecution." The petition for removal was disallowed, and the defendants excepted, and assign the ruling as error.

If the petition had been entertained by the court, and the removal ordered, it would have been upon the ground that the controversy was really between citizens of different states; that is that it was an action between the Dubuque & Sioux City Railroad Company, of the state of Iowa, and of the defendant, a citizen of the state of New York. But the assignment to the plaintiff invested him with the title to the claim or cause of action, and authorized him to prosecute it by suit. We have recently decided that in such case a party has no right to a removal of the cause to the federal court. See *Vimont v. Chicago & N. W. R'y Co.*, 64 Iowa, 513.

IV. The venue of the actions was changed from the circuit court to the district court of Webster county on the application of the plaintiff. The defendants insist that the showing made for the change

4. REMOVAL
of cause to
federal court:
trustee as
plaintiff:
citizenship of
beneficiary
not consider-
ed.

5. NOTARY
public: seal
of foreign
notary: pre-
sumption as
to contents of.

Goodnow v. Litchfield.

of venue was insufficient. The affidavit of the plaintiff in support of the motion to change the venue was as follows:

"STATE OF IOWA, COUNTY OF WEBSTER—IN THE CIRCUIT COURT
OF SAID COUNTY.

"Edward K. Goodnow v. Grace C. Litchfield.

"I, Edward K. Goodnow, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; that M. D. Miracle, judge of this court, is, to the best of my knowledge and belief, so prejudiced against me that I cannot obtain a fair trial before him, and that the existence of such prejudice was not known to me prior to the last continuance of this cause.

EDWARD K. GOODNOW."

"State of New York, County of New York.

"I, A. C. Vaughan, a notary public in and for the county and state of New York, do hereby certify that the foregoing affidavit was sworn to before me, and subscribed in my presence, by said Edward Goodnow this eighth day of May, A. D. 1882.

"Witness my hand and seal. A. C. VAUGHAN,

[Seal.]

"Notary Public, Kings County.

"Ctf. filed in New York County."

<p>ARTHUR C. VAUGHAN, Notary Public, Kings Co., New York Co.</p>
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It is objected that the affidavit was not authenticated as required by the law, because the name of the state was not impressed on the seal of the notary public, and

THE SAME. the case of *Stevens v. Williams*, 46 Iowa, 540, is relied upon as decisive of the question. In that case a notary public in Michigan affixed as a seal to a certificate to depositions a wafer, with his name and the name of the county written with a pen, and there was no impression on the paper or wafer. It was held that, as no proof was introduced that the laws of Michigan were different from our own, the authentication was not sufficient.

No objection is urged in argument as to the sufficiency of

the seal, excepting that the name of the state is not engraved thereon. This is required by the laws of this state, and, while it is true the laws of other states are presumed to be the same as our own, unless the contrary is shown, yet we think it is fair to presume that some showing was made in the court below that by the laws of New York the name of the state was not required to be engraved on the seal. *Levy v. Wilson*, 43 Iowa, 605. We think this should be presumed in this case, because it does not appear affirmatively that this specific question was raised in the court below. The only objection made to the change of venue was a general exception to the order making the change. It is said that no presumption can be entertained that any evidence was introduced, because it appears from the abstract that all of the evidence introduced in the court below is contained in the abstract. We think this has reference to the evidence taken upon the trial of the case in the district court, and not to the preliminary proceedings in the circuit court. It is further objected that the supporting affidavit for a change was not properly authenticated, because in its caption it is entitled "State of Iowa, County of Webster," and it appears to have been sworn to before a notary public in Dubuque county, in this state. The presumption is that the notary public took the affidavit within his own jurisdiction, and the caption does not show that it was sworn to in Webster county.

6. PRACTICE
in supreme
court : pre-
sumption as
to evidence
on motion for
change of
venue.

7. NOTARY
public: juris-
diction : pre-
sumption in
favor of.

V. There is no other question in these cases except such as have been already determined by this court. We need not cite them. The most of them are cited in *Goodnow v. Wells*, ante, p. 654, decided at the present term.

AFFIRMED.

MILLS COUNTY NAT. BANK V. MILLS COUNTY.

1. **County Warrants on Ditch Fund: JUDGMENT AGAINST COUNTY WHEN NO SUCH FUND.** Where a ditch has been constructed by the county under chap. 2, title 10, of the Code, and warrants have been drawn on the ditch fund, and payment thereof is refused, when presented to the county treasurer, because the supervisors have not raised a fund by the levy of a tax, as contemplated by § 1214 of the Code, the holder of the warrant is entitled to a judgment against the county for the amount thereof, and to the enforcement of payment by the levy of a tax in obedience to the provisions of the statute. It is not necessary to the recovery of such judgment that a request be made upon the supervisors to raise a fund by the levy of the proper tax, and that such request be denied.

TUESDAY, DECEMBER 15.

THIS is an action upon two county warrants drawn by the auditor of the county upon the treasurer. There was a demurrer to the petition, which was sustained, and plaintiff appeals.

E. B. Woodruff, for appellant.

Watkins & Williams and *Lewis & Young*, for appellee.

ROTHROCK, J.—The warrants upon which the suit was brought are as follows:

“OFFICE OF COUNTY AUDITOR,
GLENWOOD, Iowa, October 2, 1879. }
“\$1,646.44.

“*Treasurer of Mills County*: Pay to Shannon, Martin & Co., or bearer, one thousand six hundred and forty-six dollars and fourty-four cents out of the Watkins ditch fund.

“H. F. WILSON, *Auditor*.

“By order of the Board of Supervisors.”

67 697
88 403
67 697
115 297
67 697
138 250

Mills County Nat. Bank v. Mills County.

"OFFICE OF COUNTY AUDITOR,
GLENWOOD, Iowa, November 5, 1883. }

"\$1,741.96.

"*Treasurer of Mills County:* Pay to Mills Co. National Bank, or bearer, seventeen hundred and forty-one dollars and ninety-six cents out of the ditch fund.

"S. C. OSBOEN, *Auditor.*

"By order of the Board of Supervisors."

The plaintiff alleges that it is the owner of the warrants, and that on the day of their respective dates they were presented to the treasurer of the county and payment demanded, which was refused, and the following indorsement was made thereon, and signed by the treasurer: "Presented, and not paid for want of funds;" and that said warrants were again presented to the treasurer on the twelfth day of February, 1885, and payment was refused. Judgment is demanded for the amount of the warrants and interest.

There are a number of grounds of demurrer. They need not be set out in full. Their substance is that the action cannot be maintained because the warrants are not payable out of the general county fund; that they are drawn upon a special fund, and must be paid out of that fund; that the action cannot be maintained because it is not alleged that the board of supervisors refused to levy a tax as provided by law for the payment of the warrants; and that defendant has no power nor authority to pay said warrants out of the general fund.

Chapter 2 of title 10 of the Code authorizes counties to locate and cause to be constructed ditches or drains, whenever the same will be conducive to the public health, convenience or welfare. The work is required to be let to the lowest bidder, and the auditor is required to draw warrants in favor of the contractors. By chapter 85 of the Acts of the Eighteenth General Assembly, these warrants are required to be drawn upon the drainage fund. Section 1214 of the Code provides that the supervisors shall make an equitable

apportionment of the expenses, cost of construction, etc., which shall be assessed among the owners of the land benefited by the construction of the ditch, in proportion to the benefit to each of them, and the assessment may be levied upon the lands of the owners so benefited, and collected in the same manner that other taxes are levied and collected for county purposes.

It will thus be seen that ample power is given to the county by its board of supervisors to construct ditches, and to provide means for the payment of the expenses attending the same. The county has as ample power to provide for the payment of a debt incurred for the construction of a ditch as it has to provide for the payment of any other debt. The only difference is that the levy of taxes therefor is to be made upon the persons whose property is benefited by the improvement. The authority for the exercise of the taxing power is as ample and effective as it is for any other lawful purpose. The claims upon which the suit is brought have been audited by the board of supervisors, and the proper warrants have been drawn, and, upon presentation to the treasurer, it appears that there is no drainage fund with which to pay the debt. The question is, how is the owner of the warrants to enforce payment? There is no such privity between him and the tax-payers that any action or proceeding can be maintained against them.

It is claimed that a demand should be made on the board of supervisors to levy a tax, and that no suit can be maintained without such demand. This position cannot be maintained. It is the duty of the county to make the levy without a demand. It might, with the same propriety, be claimed that the holder of any other warrant upon the county must make a demand that a tax be levied to pay his warrant before he can maintain an action. The county has an undoubted right to make any proper and lawful defense to these warrants. If it has no defense, the plaintiff is entitled to judgment, and to the enforcement of payment by the levy of a

 Garmoe v. Sturgeon et al.

tax in obedience to the requirements of the statute above cited. We do not determine that the plaintiff can, by *mandamus*, compel the county treasurer to pay the warrants from the general funds of the county. The law contemplates that the owners of property benefited by the ditch must pay the cost of its construction, and if the plaintiff obtains judgment upon the warrants, the method of raising means for its payment is plainly pointed out by statute. We think the demurrer to the petition should have been overruled.

REVERSED.

 GARMOE V. STURGEON ET AL.

97	700
115	28

1. **Appeal: FROM ORDER ADMITTING NEW EVIDENCE IN LOWER COURT AFTER REVERSAL.** Where a cause appealed to this court was reversed and remanded to the lower court for a decree in accordance with the opinion of this court, and defendant was then permitted in the lower court, against plaintiff's objection, to introduce additional evidence, *held* that such ruling was not such a final order as would sustain an appeal to this court, since it could not be said in advance that such evidence would determine the case against plaintiff.

Appeal from Webster District Court.

TUESDAY DECEMBER 15.

THIS is an action in chancery to quiet the title to lands. The facts involved in the question ruled by the district court appear in the opinion. Plaintiff appeals.

Wright & Farrel, for appellant.

Hull & Whitaker and *G. G. Wright*, for appellees.

BECK, CH. J.—I. This cause has before been in this court, 65 Iowa, 147. Upon the first appeal the decree dismissing the petition as to defendant Sturgeon was reversed upon the

Garmoe v. Sturgeon et al.

ground that it was not supported by the testimony. After this decision Sturgeon filed his motion in this court, asking that the cause be remanded, with leave to introduce additional evidence, which was overruled. The cause was finally remanded to the court below for a decree not inconsistent with the opinion of this court. After the cause was sent to the district court, defendant filed a motion there, supported by affidavit, asking to be allowed to introduce additional evidence, which was sustained. From this order plaintiff appeals. The main and controlling question in the case arises upon objections thereto.

II. The order appealed from, regarding it as in effect a ruling of the court below permitting new evidence to be introduced after the reversal of the cause in this court, does not so involve the merits of the case and so materially affect the final decision that it will support an appeal. See Code, §§ 3163, 3164. It does not follow, because the evidence will be considered in the court below, that the decree will be against plaintiff. The district court may determine that it would not authorize such a decree, or may finally conclude that it ought not to be considered in the final disposition of the case. The order belongs to that class of intermediate proceedings the effects of which can only be determined upon the final decision of the case.

III. It is said that the evidence admitted under the order will determine the case against plaintiff; but this cannot be said until there has been an adjudication to that effect. This conclusion is in accord with the doctrine recognized in *Richards v. Burden*, 31 Iowa, 305. We do not determine whether the court below rightly ordered the admission of evidence, but only hold that no appeal may be taken therefrom.

Defendant's motion to dismiss the appeal is

SUSTAINED.

DARLING V. BOESCH ET AL. (TWO CASES.)

67	702
87	660
67	702
1126	129

1. **Intoxicating Liquors: GRANTING PERMIT BY SUPERVISORS: REVIEW OF PROCEEDINGS BY CERTIORARI.** Under the provisions of § 1530 of the Code, any resident of the county may appear and show cause why a permit to sell intoxicating liquors should not be granted to an applicant therefor; and a resident of the county who thus becomes a party to such proceeding is entitled to have the proceedings reviewed on *certiorari*, in a proper case, notwithstanding he has no pecuniary or property interest that is affected by the action of the board. *Welch v. Board of Supervisors*, 23 Iowa, 199, and other similar cases, distinguished.

ROTHROCK, J., *dissenting*.

2. ———: WHAT QUESTIONS CONSIDERED. The decision of a board of supervisors on questions of fact involved in a proceeding cannot be reviewed on *certiorari*. (*Tiedt v. Carstensen*, 61 Iowa, 334.) And so a court cannot review the finding of the board on the question of the good moral character of an applicant for a permit to sell liquors, or as to whether the granting of the permit was necessary for the accommodation of the neighborhood; but where the complaint is that the board acted without any certificate of good moral character being presented to the county auditor, as required by law, a question of jurisdiction is raised, which is proper to be considered on *certiorari*.
3. **Legislation: APPROVAL OF GOVERNOR: WHEN NECESSARY: REPEAL OF CODE, § 1527.** Under § 16 of Article 3 of the constitution, bills which are presented to the governor within the last three days of a session of the general assembly, and which he neither signs, nor returns with objections, before the adjournment, become laws only in case he subsequently approves them. It is not sufficient that he return the bill within thirty days after the adjournment without his approval. Accordingly, a bill passed by both houses of the Nineteenth General Assembly, repealing § 1527 of the Code, which requires an applicant for a permit to sell intoxicating liquors to present to the county auditor a certificate of good moral character, *held* never to have become a law, and that the section was not thereby repealed.

Appeal from Des Moines Circuit Court.

TUESDAY, DECEMBER 15.

THESE causes involve the same questions, were submitted

on the same abstract, and will be disposed of in one opinion. Plaintiff is a citizen and a resident of Des Moines county, and defendants are the members of the board of supervisors of said county. George Bandleon and John Kneuzler made application to the board of supervisors for permits to manufacture, buy and sell intoxicating liquors in said county. At the time appointed for the hearing of said applications plaintiff appeared and showed cause why such permits should not be granted. The board, however, granted the permits. Plaintiff then instituted these suits, and he alleges in his petitions that the board of supervisors acted unlawfully, and exceeded its jurisdiction in granting said permits, for the following reasons: (1) That the applicants therefor did not first procure and present to the county auditor certificates signed by a majority of the legal electors of the township, town or ward in which they desired to sell intoxicating liquors, setting forth that they were citizens of the county, and men of good moral character, and proper persons to manufacture, buy and sell such liquors. (2) That said applicants were not proper persons to receive such permits; that they were saloon-keepers, and had been constantly engaged in the business of keeping saloons and selling intoxicating liquors in violation of the laws of the state since their applications were filed. The prayer of the petition is that a writ of *certiorari* issue commanding the defendants to certify to the circuit court a transcript of the records and proceedings in reference to said applications and the granting of said permits. The circuit court sustained demurrers to the petition, and from these orders plaintiff appeals.

Newman & Blake, for appellant.

Hall & Huston, for appellees.

REED, J.—I. One of the grounds of demurrer is that “plaintiff has no right or interest that entitles him to call

Darling v. Boesch et al.

1. INTOXICATING liquors: granting permit by supervisors: review of proceedings by certiorari.

for the writ. He has no property interest or office that is affected." The general rule undoubtedly is that an action of *certiorari* or *mandamus* cannot be maintained for the correction of irregularities or errors in the proceedings of the board of supervisors by one having no pecuniary interest in the proceedings. This has been repeatedly held by this court. See *Welch v. Board of Supervisors*, 23 Iowa, 199; *Smith v. Yoram*, 37 Id., 89; *Iowa News Co. v. Harris*, 62 Id., 501. But, in our opinion, the present case is not governed by that rule. Section 1530 of the Code is as follows: "At such final hearing, any resident of the county may appear and show cause why such permit should not be granted, and the same shall be refused, unless the board shall be fully satisfied that the requirements of the law have, in all respects, been complied with; that the applicant is a person of good moral character; and that, taking into consideration the wants of the locality and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood." Under this provision, the board is required at the final hearing of the application to determine these questions: (1) Whether the requirements of the law have been complied with; (2) whether the applicant is a person of good moral character; and (3) whether the permit is necessary for the proper accommodation of the neighborhood. In determining these questions the board exercises judicial functions.

The section also permits any citizen of the county to appear at the hearing, and show cause why the permit should not be granted. In resisting the granting of the permit, he may make a showing with reference to either of the questions which the board is required to determine. He may introduce evidence to negative either of the facts which the statute provides must be proven before the permit shall be granted. He, in effect, becomes a party to the proceeding. He has the right to call and examine witnesses, and to intro-

duce documentary evidence on the hearing. He is allowed to do this, not because he has any pecuniary interest in the proceeding, but because, as a resident of the county, he is interested in the faithful execution of the laws within the county. As a citizen of the county he has the right to demand that permits to sell intoxicating liquors shall be granted only to persons of good moral character who have fully complied with the requirements of the law, and when they are necessary for the proper accommodation of the the neighborhood; and the statute, recognizing his right in this respect, permits him to become a party to any proceeding for the granting of a permit, and to resist the application. As the law permits him to become a party to the proceeding, and recognizes in him such interest and right as entitles him to become a party, it follows necessarily, we think, that he is entitled to have the proceeding reviewed, and the errors and irregularities therein corrected, by the mode prescribed by law for the correction of errors and irregularities in such proceedings. His right to maintain the actions, then, does not depend upon whether any property interest of his is affected by the proceeding, but upon the fact that he was allowed to become a party to it.

II. Another ground of the demurrer is that "the application is too general, and would require the court to try the facts instead of the lawfulness or regularity of the action of the board." The decision of the board on the questions of fact involved in the proceeding cannot be reviewed on *certiorari*. *Tiedt v. Carstensen*, 61 Iowa, 334. Under this rule the court could not review the finding of the board on the question of the good moral character of the applicant, or as to whether the granting of the permit was necessary for the accommodation of the neighborhood. The writ of *certiorari* is granted when the inferior tribunal, board or officer is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally; (Code, § 3216;) and it cannot be said that the board

Darling v. Boesch et al.

has acted unlawfully because it erred in the determination of a question which it was required to determine in the proceeding. In the present case the complaint is, not that the board wrongly determined that a sufficient number of electors had signed the certificate, but that it granted the permit without any certificate having been presented to the county auditor. Appellees contend that there is now no statute in force requiring the applicant for a permit to sell intoxicating liquors to present such certificate to the auditor.

In 1882 a bill was passed by the two houses of the general assembly which contained a provision repealing section 1527 of the Code. This bill was presented to the governor for his approval during the last three days of the session of the general assembly, but he did not sign it. Within thirty days after the adjournment, however, he deposited it in the office of the secretary of state, but filed no objection to it. Counsel for appellees contend that this bill became a law. Their argument is that the only powers with reference to legislation with which the governor is vested is the negative power of veto; and that, while he may by the exercise of that power prevent a bill which has been passed by the general assembly from becoming a law, his assent or approval is not required before it can become a law. The provisions of the constitution with reference to this subject are found in section 16 of article 3 of that instrument. It is there provided that every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor; and that if he approves it he shall sign it, but that if he does not approve it he shall return it with his objections to the house in which it originated, and that it shall then be reconsidered by the general assembly, and that, if it shall again pass both houses by a majority of two-thirds of the members of each house, it shall become a law notwithstanding the governor's objection. The section also contains the following provision: "If any bill shall not be returned within three

3. LEGISLA-
TION: ap-
proval of gov-
ernor: when
necessary:
repeal of
Code, § 1527.

Darling v. Boesch et al.

days after it shall have been presented to him, (Sunday excepted,) the same shall be law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapprove thereof." There can be no doubt, we think, as to the effect of these provisions. Under them the governor has three days after the bill is presented to him within which to approve it or return it with his objections. If he approves it within that time, it becomes a law; if he neither signs it nor returns it with his objections within that time, it becomes a law in like manner as if he had signed it, "unless the general assembly by adjournment prevent such return." This latter provision is clearly a negative provision. It creates an exception to the rule established by the preceding provision. It provides, in effect, that bills which have been presented to the governor within the last three days of a session of the general assembly, and which he neither signs nor returns with objections before the adjournment, become laws only in case he subsequently approves them. This, we think, is the necessary effect of the language of the provisions. It follows, therefore, that section 1527 has not been repealed; and the board of supervisors acted illegally in granting the permits without the certificates required by it having been presented to the auditor. The judgment of the circuit court will be reversed, and the cause remanded for further proceedings in that court.

REVERSED.

ROTHROCK, J., *dissenting*.—I cannot assent to the first point in the foregoing opinion. The statute authorizes any resident of the county to appear and show cause why a permit should not be granted, but it does not authorize him to

Baker v. Ryan.

institute an original action to amend the acts of the board of supervisors. I think that when he has had an opportunity to be heard before the board his right to make further contest is at an end. Without authority conferred by statute, he can have no standing in any court, because he has no such interest in the matter as confers upon him any right to institute an action.

BAKER V. RYAN.

67 708
115 627

1. **VENUE: PERSONAL ACTION FOR DAMAGES, AIDED BY INJUNCTION TO RESTRAIN COLLECTION OF JUDGMENT: REMOVAL TO COUNTY OF DEFENDANT'S RESIDENCE: INJUNCTION DISSOLVED.** Defendant, a resident of Jasper county, through his negligence as plaintiff's attorney, (as plaintiff alleges,) allowed other parties to procure a judgment against plaintiff in the district court of Scott county, which judgment defendant afterwards purchased, and was about to enforce against plaintiff's homestead. Plaintiff in this action, also brought in the district court of Scott county, seeks to recover damages against defendant for his negligence, and to offset the same against the judgment, and to enjoin the collection of the judgment pending the action. Defendant moved for a change of the place of trial to the county of his residence, and for a dissolution of the injunction. *Held* that both motions should have been sustained, because—
 - (1) The action for damages, being a mere personal action, should have been brought in the county of defendant's residence, (Code, § 2586,) and the injunction in aid thereof, conceding it to have been properly allowed, did not necessitate the bringing of the action in Scott county, under § 8396 of the Code, because it was not based on any alleged defect or invalidity in the judgment, but on facts subsequently arising; and to such a case the statute does not apply.
 - (2) The injunction should have been dissolved because the judgment was admitted to be valid and subsisting, and, in the absence of an allegation of defendant's insolvency, plaintiff was not entitled to have execution delayed in order that he might offset his demand in case of recovery.

Appeal from Scott District Court.

TUESDAY, DECEMBER 15.

Baker v. Ryan.

ACTION in equity, in which an injunction was asked and obtained. Certain motions made by the defendant were overruled and he appeals.

Winslow & Varnum, for appellant.

W. A. Foster and *L. A. Ellis*, for appellee.

SEEVERS, J.—The petition states that the First National Bank of Davenport obtained a judgment against the plaintiff in the district court of Scott county, and that the bank commenced an action in the circuit court of Jasper county to subject the plaintiff's homestead to the payment of said judgment; that the defendant, who is a practicing attorney, was employed by the plaintiff to defend such action, but that, by reason of the defendant's negligence, the plaintiff therein obtained a judgment subjecting his homestead to the payment of the judgment in favor of the bank; (*First Nat. Bank of Davenport v. Baker*, 57 Iowa, 197, and *Same v. Same*, 60 Id., 132;) that by reason of such negligence the plaintiff sustained damages in the sum of \$2,000; and that the defendant had purchased and is the owner of the judgment in favor of the bank, and that he has caused an execution thereon to be issued by the clerk of the district court of Scott county, directed to the sheriff of Jasper county, who has levied the same on the plaintiff's homestead, situated in Jasper county. The relief asked is that such damages be ascertained, and the same set off against said judgment, and plaintiff offers to pay any excess there may be. It is further asked that the defendant be enjoined from selling plaintiff's homestead under said execution. The defendant, Ryan, filed an answer to the petition, and for the purposes of this opinion it will be conceded that he admitted all the allegations of the petition. He also pleaded an affirmative defense, which need not be stated. The defendants moved the court to change the place of trial, and to dissolve the injunction on

the ground that there was no equity in the petition. These motions were overruled.

I. It is insisted that the court erred in overruling the motion to change the place of trial, on the ground that the defendants were residents of Jasper county, and that the action was a personal action. We are of the opinion that this is a personal action, and that the motion should have been sustained. Code, § 2586. The plaintiff undoubtedly seeks to recover a judgment against Ryan on the ground of negligence. He clearly is not entitled to any relief unless he establishes the negligence alleged, and that he is entitled to damages. This, therefore, is a personal action against Ryan. The statement of the proposition demonstrates it, and argument in its support might have a tendency to obscure what is so apparent. Section 3396 of the Code provides that when "proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the suit must be brought in the county and court in which such action is pending or the judgment or order was obtained;" and it is said, as the object of the action was to obtain an injunction against the enforcement of the judgment by the sale of the plaintiff's homestead, that no other court than the one in which the judgment was obtained had the jurisdiction and power to grant the injunction. Conceding this to be so, the injunction was auxiliary only, and pertains merely to the remedy, and therefore cannot have the effect of changing what would otherwise be a personal action into something else. It is true that, where the object of an action is to declare the judgment or final order to be invalid, the action must be brought in the court in which the judgment or order was obtained. It has been so held. *Lockwood v. Kitteringham*, 42 Iowa, 257; *Anderson v. Hall*, 48 Id., 346; *Bennett v. Hanchett*, 49 Id., 71; *Grattan v. Matteson*, 51 Id., 622. But in the case at bar the validity of the judgment is conceded. It does not appear that it is inherently defective. It is conceded that the judgment

is in full force and effect. Why, then, should it not be enforced? Simply because the plaintiff has an independent cause of action against the defendant which should be adjudicated and determined before the judgment should be enforced in the manner the plaintiff seeks to enforce it. In our opinion, the statute should not be construed as embracing such a case.

The object of the statute is to prevent a conflict between courts. Hence the action contemplated by the statute is required to be brought, not only in the same county, but in the same court. If the action is brought to set aside the judgment or order upon the ground that it should not have been entered, or for any reason which inheres in or grows out of the judgment, there is much reason in requiring it to be brought in the court which rendered the judgment, and such a case is evidently contemplated in the statute. So, too, if the object of the action is to declare it invalid for some reason which existed at the time the judgment was rendered. But suppose that some matter has arisen since the judgment was rendered,—such as payment,—why should the action to enjoin its enforcement be brought in the same court? In the case at bar, the plaintiff seeks to enjoin the judgment, not on the ground that it never should have been entered, or that it is invalid, or should not be enforced, but because facts which have occurred since the judgment was entered make it inequitable to enforce it by the sale of his homestead. This is an independent cause of action which has accrued since the judgment was rendered, and we think such a case is not within the spirit and intention of the statute, and may therefore be brought in any court having jurisdiction of the parties and subject-matter.

II. In our opinion, the court erred in overruling the motion to dissolve the injunction. Much that has been said is applicable to this question. The defendant has a valid judgment against the plaintiff which he seeks to enforce by the sale of property upon which it is a lien. The plaintiff

Bond v. The Wabash, St. Louis & Pacific R'y Co.

has a simple claim or cause of action against the defendant, which he seeks to offset against the judgment, and there is no averment that the defendant is insolvent. Now, it seems clear to us that such offset cannot be made, and this probably will be conceded by counsel for the appellee. Their contention is, as we understand it, that, because of the relation of trust and confidence which existed between the plaintiff and defendant in the former action, the latter should not now be permitted to enforce the payment of the judgment by the sale of the property in question. But, conceding the negligence of the defendant, and that the plaintiff is entitled to recover damages therefor, the only effect of this concession is to show that the plaintiff has a cause of action against the defendant. On this cause of action the plaintiff is not entitled to recover because of confidence reposed in the defendant as an attorney. His action is based on negligence for which any employer may recover of an employee. It is independent of, and has no connection with, and does not grow out of or inhere in, the judgment. The court erred in not sustaining both motions.

REVERSED.

67	713
79	563
67	712
106	261
67	719
106	338
67	712
125	451
67	712
130	258
67	712
132	672
133	529

BOND V. THE WABASH, ST. LOUIS & PACIFIC RY CO.

- 1. Railroads: EXTORTION AND UNJUST DISCRIMINATION: PENALTY:** STATUTE STRICTLY CONSTRUED: § 13, CHAP. 77, LAWS OF 1873. Section 13, Chapter 77, Laws of 1873, providing a penalty for the violation of any of the provisions of said act "as to extortion or unjust discrimination," is, like all other penal statutes, to be strictly construed, and must be limited to extortion and discrimination in making charges; and the penalty of treble damages cannot be recovered for a failure or refusal to furnish cars or transportation, as required by § 10 of the act.
- 2. Practice in Supreme Court: CONSIDERATION OF QUESTIONS NOT LIMITED BY REASONING OF COUNSEL.** Where questions are properly brought to the notice of this court, the court's consideration of them is not limited to the reasons urged by counsel in argument; and if objections

Bond v. The Wabash, St. Louis & Pacific R'y Co.

properly arising seem to the court to be well taken they will be sustained, even though the reasons urged by counsel in support of them must be discarded, and sound reasons substituted.

3. ———: THE THEORY OF A CAUSE MUST BE ADHERED TO. The theory of a cause cannot be changed on appeal; and where an action for treble damages was brought under one statute, the right to recover actual damages under another statute cannot be considered on appeal.
4. ———: CAUSE NOT DIVIDED. Where a judgment in a law action is based on several independent counts, and it is found erroneous as to some of the counts, it will not be affirmed as to part and reversed as to part, but the case as a whole will be reversed and remanded.
5. ———: CONSTITUTIONAL QUESTIONS CONSIDERED WITH RELUCTANCE. This court will not consider constitutional questions unless it is necessary for the disposition of the case.

Appeal from Pottawattamie Circuit Court.

TUESDAY, DECEMBER 15.

ACTION to recover for refusal of defendant to transport corn for plaintiff, and for failure of defendant to transport corn with promptness, by reason whereof it sustained injury. There was a verdict and judgment for plaintiff. Defendant appeals.

D. H. Solomon, for appellant.

Sapp & Pusey, for appellee.

BECK, CH. J.—I. The petition is in five counts. The first alleges the corporate capacity of the defendant, and the route and extent of its railroad. The second alleges that defendant refused to furnish cars for transportation of corn from Mineola, a station on defendant's railroad, to St. Louis, which plaintiff had contracted to deliver upon the cars at Mineola. The third count alleges that defendant refused to furnish plaintiff cars to transport corn from Mineola to Toledo, Ohio, and St. Louis and Kansas City, Missouri, although defendant was then furnishing cars to other persons for transportation of property to the cities just mentioned. The fourth alleges

Bond v. The Wabash, St. Louis & Pacific R'y Co.

that defendant refused to draw cars of the Kansas City, St. Joseph & Council Bluffs Railroad Company from Council Bluffs to Mineola, to be there loaded with plaintiff's corn, and to be transported to Council Bluffs, and there delivered to the Kansas City, St. Joseph & Council Bluffs Railroad Company, to be hauled to the places of their destination. The fifth count alleges that plaintiff shipped upon defendant's railroad, to be transported to Toledo, Ohio, certain corn, which was injured by unreasonable delay, caused by the neglect of defendant. The petition claims to recover, upon the second and fifth counts, actual damages, and upon the third and fourth treble damages. The jury found the damages as claimed by plaintiff,—actual damages on the second and fifth counts, and treble damages on the third and fourth.

II. Plaintiff claims to recover upon the third and fourth counts under chapter 77, § 13, Acts Seventeenth General Assembly, (Miller's Code, 352.) The case was tried on the theory that, upon the case made by these counts and the evidence, plaintiff is entitled to recover under that provision treble damages, the court so holding in instructions and in other rulings. So much of the section of the act referred to as is necessary to quote is as follows: "Any railroad corporation which shall violate any of the provisions of this act as to extortion or unjust discrimination shall forfeit, for every such offense, to the person, company or corporation aggrieved thereby, three times the actual damages sustained or overcharges paid by the said party aggrieved, together with the costs, and reasonable attorney's fees to be fixed by the court." The provisions, the violation of which subjects a railroad company to the penalty prescribed, are found in the following sections of the statute:

1. RAILROADS:
extortion and
unjust dis-
crimination;
penalty: stat-
ute strictly
construed: §
13, chap. 77,
Laws of 1878.

"Sec. 10. It shall be the duty of any railroad corporation, when within their power to do so, and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of

Bend v. The Wabash, St. Louis & Pacific R'y Co.

freight, and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for receiving and hauling the same at any depot on the line of its road; and also to receive and transport in like manner the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting, and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service.

"Sec. 11. No railroad corporation shall charge, demand or receive from any person, company or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall at the same time charge, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions, or under similar circumstances, and all concession of rates, drawbacks and contracts for special rates shall be open to and allowed all persons, companies and corporations alike, at the same rate per ton per mile by car-load, upon like condition and under similar circumstances, unless, by reason of the extra cost of transportation per car-load from different points, the same would be unreasonable and inequitable; and shall charge no more for transporting freight from any point on its line than a fair and just proportion of the price it charges for the same kind of freight transported from any other point.

"Sec. 12. No railroad company shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or sorting of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation."

III. The "extortion or unjust discrimination" contemplated in section 13 arises by extortionate or discriminating charges, not from failure or refusal to furnish transportation,

or to furnish cars. There can be no doubt of the correctness of this construction, so far as the penalty provided by section 13 rests upon the violation of duties imposed by sections 11 and 12, which relate only to freight charges; and there is as little doubt that section 10 does not provide against "discrimination" in furnishing cars or in transportation of property. It simply imposes duties which the common law lays upon all carriers, with others relating to the furnishing of cars and the transportation of cars delivered to a railroad from a connecting road. There is nothing in the section which in direct language so forbids "discrimination" that it can be said the penalties of section 13 were intended to apply thereto. It is a familiar rule that penal statutes must be strictly construed, and cannot be extended by implication. See Potter's Dwar. St., 245, and notes. The statute in question, as it imposes a forfeiture for doing a thing therein prohibited, is to be regarded as penal. Potter's Dwar. St., 74, 75. The statutes in question are to be regarded as penal, and they cannot, therefore, be construed to impose a penalty for "discrimination" in furnishing transportation. It clearly appears that plaintiff's petition presents no case for treble damages under the statute in question.

IV. Defendant's counsel makes various objections to the proceedings and judgment, but fails to present as a reason for supporting any one of them the fact that the statutes upon which the third and fourth counts are based do not authorize the recovery of treble damages for the acts alleged in the petition and established by the evidence. He makes objections to the evidence, to rulings upon instructions and upon a motion in arrest, but does not support any one of them upon the ground that treble damages are not recoverable in the case made by plaintiff. But defendant could have assigned as a reason in support of more than one objection this very ground. It is, then, the case of a failure to present the proper reason in support of objections. We will not con-

2. PRACTICE
in supreme
court: con-
sideration of
questions not
limited by
reasoning of
counsel.

sider points not made in the courts below and in this court; but this rule does not extend to reason upon which points may be sustained. We are not bound to follow the reasons of parties or counsel. We may discard all their reasons, and support their objections or positions upon the true grounds, even if they have not rested upon them. Our conclusion, therefore, that the case cannot be maintained, that erroneous instructions were given and evidence erroneously admitted, or a motion in arrest erroneously overruled, upon the ground that treble damages are not recoverable, is not a decision of a point not made in the case, but is the application of reasons, not relied upon by defendant, which lead us to support the points or objection urged in the court below and in this court.

V. It is possible that plaintiff may recover actual damages under the common law, or under another statute. See

3. ———: the theory of a cause must be adhered to.

Code, § 1292. But to entitle him to recover upon either, he must frame his suit to that end.

He cannot surely sue to recover treble damages under one statute, and upon appeal from a judgment awarding the relief he seeks, ask the court to require defendant to accept a judgment here for actual damages. Nor can defendant, in this court, in a like case, require such a judgment to be entered here. The judgment upon two counts being for treble damages, is erroneous.

This demands a reversal of the judgment as to the whole case. We cannot divide up a case, keeping a part of it here,

4. ———: cause not divided.

by affirming the judgment to a certain extent and remanding the other part for a new trial in the

circuit court. The reversal must therefore extend to the whole case. It is plain that such a course will be more likely to attain the ends of justice than the other, which would divide the case, and settle a part of it at a time. It appears that the court below may, in a proper case, grant a new trial as to part of the case, but that, generally, this will not be done. *Woodward v. Horst*, 10 Iowa, 120. The reasons which support the authority of the court below to grant a

Dead v. The Wabash, St. Louis & Pacific R'y Co.

new trial on part of the counts of a petition do not apply to this court. We cannot sanction such a practice here. The judgment must be reversed as to the whole case.

VI. There are many questions discussed by counsel; among others, one involving the constitutionality of the sections of chapter 77 of the Acts of the Seventeenth General Assembly, above quoted. We will not consider constitutional questions unless it is necessary for the disposition of the case. For this reason we cannot consider the constitutional question argued by counsel.

VII. Other questions argued by counsel we shall not consider, for two reasons: (1) It is certain that some of them will not arise upon another trial in the court below. Indeed, if the pleadings be amended, as they certainly ought to be, many of these questions will not probably again arise. (2) Some of the questions are not presented in a sufficiently clear manner to enable us to determine them to our satisfaction. Doubtless, if the case should come here again, counsel, in the exercise of greater care, would correct this fault. It may be further said that counsel for plaintiff do not notice many questions presented by defendant.

The judgment of the circuit court is

REVERSED.

COMMERCIAL EXCHANGE BANK V. McLEOD ET AL.

1. **Consideration: PRESUMED FROM WRITING.** A written contract (a mortgage in this case) imports a consideration and casts the burden upon him who denies it.
2. —: **SETTLEMENT OF CONTROVERSY.** A mortgage made to secure a claim in litigation held to be based upon a sufficient consideration.
3. **Promissory Note: PURPOSE FOR WHICH GIVEN: LANGUAGE OF AIDED BY LANGUAGE OF COLLATERAL MORTGAGE.** A writing on the back of a note purported to state the extent of the makers' liability, but a reformation of the writing was sought in order to make it show the real agreement of the parties. Held that the recitations of certain mortgages subsequently executed by the same makers to secure the note was properly considered in arriving at the intention of the parties.

Appeal from Cerro Gordo District Court.

TUESDAY, DECEMBER 15.

ACTION IN EQUITY. Judgment for the plaintiff, and defendants appeal.

Glass & Hughes, for appellants.

Blythe & Markley, for appellee.

SEEVERS, J.—The undisputed facts are that in July, 1882, one Ridgway made an arrangement whereby the plaintiff agreed to advance him money for business purposes from time to time, as he might need it. Ridgway was to draw his checks or drafts on the bank. To secure the amount of such over-drafts, a note was executed for \$2,900, payable to the bank, and the same signed by Ridgway and the defendant Mary McLeod, and the collection of the note was guaranteed by one Berry. Upon the back of the note there was an indorsement showing the overdrafts of Ridgway, not exceeding the amount of the note. In October, 1882, Ridgway was indebted to the bank in the sum of nearly \$1,900, and, Berry desiring to be released from his continuing liability, it was agreed between Ridgway and the plaintiff that a note for the same amount should be executed and signed by Ridgway and the defendants Mary and J. O. McLeod. Such a note was executed, but it is a controverted question what it was given to secure. The following words are indorsed on the note: "It is understood by the makers of the note that it is given to secure overdrafts of G. E. Ridgway due the Commercial Exchange Bank." The plaintiff claims that the contract in fact was that the note was given as security for existing and all future overdrafts, and that the contract, as expressed in the indorsement on the note, by the mutual mistake of the parties, does not state the true contract. The relief asked is that the writing aforesaid be reformed, and that the plaintiff may have judgment for the amount due on the note. The defendants claim that the writing states the

true and only contract that was made. It becomes material to determine which of these theories is correct, for the reason that the plaintiff only seeks to recover for overdrafts made by Ridgway subsequent to the execution of the note. There is some conflict in the parol evidence as to what the contract was, and whether there was a mistake in the writing.

The plaintiff, in a supplemental petition, states that in August, 1883, there was an accounting had between the plaintiff and defendants, the two McLeod's and that it was then agreed that there was due the plaintiff on the note for overdrafts the sum of \$1,322.84, to secure which the said defendants executed certain mortgages, and the plaintiff asks judgment for said amount, and the foreclosure of the mortgages. The defendant, in answer to this petition, pleaded that the mortgages were procured by fraud, and were executed without consideration.

I. The mortgages import a consideration, and the burden was on the defendants to establish that they were procured by fraud, and were without consideration. We have examined the evidence, and are fully satisfied that the defendants have failed to establish that the mortgages were procured by fraud, and we are equally clear that they were executed upon a sufficient consideration. The evidence shows that a suit had been commenced on the note, and that the attorney, acting for the plaintiff, called upon the defendants for the purpose of obtaining payment or security for the amount due. He stated the amount he claimed to be due, and that the defendants were bound therefor because of their having signed the note. According to his evidence, they admitted their liability. It will be conceded that the defendants deny in their evidence that they did so; but we must remark that there is an apparent want of frankness and clearness in the evidence of the defendants, which generates the conclusion that full faith and credit cannot be given to all of their statements. But, be this as it may, the claim was made on the part of the plaintiff

1. CONSIDERATION: presumed from writing.

2. —: settlement of controversy.

that the defendants were liable on the note to the amount then claimed to be due. It may be conceded that this was a doubtful question. It certainly was not entirely clear that they were not liable. A suit against them was then pending. In settlement of the suit, and the whole controversy, the mortgages were executed, as we think, upon a sufficient consideration.

II. The mortgages contain this statement: "Whereas, the said J. C. McLeod and Mary McLeod are indebted unto the said Commercial Exchange Bank in the sum of two thousand dollars, as witnessed by one promissory note of \$2,000, dated October 31, 1882, said note given as collateral to secure any overdrafts of G. C. Ridgway at said bank, said overdrafts now being the sum of \$1,322.84; also all costs in a certain attachment suit on said note, now commenced in Worth county, Iowa." Now, conceding that the parol evidence is conflicting, and is not alone sufficiently definite and certain to warrant us in reforming the writing on the back of the note, we think the statements in writing in the mortgages in aid of the parol evidence on the part of the plaintiff clearly creates a preponderance in its favor. We go further, and say that, when the statement in the mortgage is considered together with the conceded facts, the plaintiff thereon is entitled to a reformation of the writing. The defendants clearly admit in the mortgage that the note was given to secure any overdrafts and the amount thereof. These are the only disputed questions. As the defendants, in substance, admit in writing what the true contract is, we are not required to determine whether a contract in writing against a surety can be reformed on parol evidence alone. There is some evidence tending to show that the amount stated in the mortgages is not in fact due, and that Ridgway is entitled to a credit of about \$1,000 which the plaintiff has not given him. But as to this, the preponderance of the evidence is clearly with the plaintiff.

AFFIRMED.

3. PROMISSORY note: purpose for which given: language of aid by language of collateral mortgage.

Warfield, Howell & Co. et al v. Lynd et al.

WARFIELD, HOWELL & CO. ET AL. V. LYND ET AL.

| 67 723 |
| 87 118 |

1. **Fraudulent Conveyance of Goods:** PRESUMPTION AGAINST FRAUD NOT OVERCOME. The evidence in relation to a transfer of a stock of goods by their owner to an alleged creditor considered, (see opinion,) and *held* not sufficient to overcome the presumption which is always entertained against fraud.

Appeal from Webster Circuit Court.

TUESDAY, DECEMBER 15.

THE plaintiffs are creditors of the defendant Lagerquist, and, as such, they bring this action to set aside a bill of sale of a stock of goods, made by Lagerquist to the defendant Lynd. The court dismissed the plaintiff's petition, and they appeal.

Wright, Cummins & Wright, and Frank Farrell, for appellants.

John F. Duncombe, for appellees.

ADAMS, J.—At the time of the execution of the bill of sale in question, to-wit, in February, 1883, the defendant Lagerquist was residing and doing business as a merchant in Gowrie, Iowa. He had previously been in business in Illinois, and at the time he sold to Lynd he had been in business in Gowrie less than a year. During that time, as the evidence tends to show, and as we think the fact is, he was more or less embarrassed. Lynd was an old acquaintance and personal friend, and had, as we infer, abundant ability to assist him. The defendants aver, and they support their allegations by their testimony, that Lagerquist borrowed money of Lynd, and that the sale was made in good faith for the purpose of paying him. The plaintiffs contend that Lagerquist did not borrow money of Lynd, as claimed, or at least not to the extent claimed, and, even if he did, that the price allowed for the goods was so much less than their value as to be

strong and convincing evidence that a secret interest must have been reserved in the goods or proceeds for Lagerquist. As tending to show that Lagerquist did not borrow money of Lynd as claimed, or to the extent claimed, the plaintiffs rely largely upon the fact that Lagerquist did not very satisfactorily show that his circumstances were such as to give rise to the necessity of borrowing from Lynd what he claims that he did. But the fact cannot be regarded as of great importance as against Lynd. He was not bound to show what Lagerquist did with all the money which came into his hands. He might concede that Lagerquist had no need to borrow money. Such fact would not be inconsistent with the fact of borrowing, and especially if Lagerquist was laying the foundation for a pretended insolvency and failure, with the view of defrauding creditors. Some other circumstances are relied upon as tending to disprove the alleged borrowing, but they do not, in our opinion, overcome the positive testimony of Lagerquist and Lynd. We cannot set out all the evidence upon which the plaintiffs rely. So far as disproof of the alleged borrowing is concerned, their showing is very far from being a strong one. We think it probable that Lagerquist actually owed Lynd the amount claimed.

One question remains to be considered, and that is, did Lagerquist reserve a secret interest in the goods or proceeds? The plaintiffs contend that he did, and that the evidence is that the bargain was so favorable to Lynd as to be unaccountable upon any other theory. In our opinion, the goods were worth more than Lynd allowed for them. But it does not appear that he knew at the time what they were worth, and the amount for which the goods afterwards sold at sheriff's sale was not much more than the amount allowed. We doubt whether a cash sale at a much greater price could have been made to any person in Lynd's circumstances; that is, to any person who was ignorant of the value, and who was not a merchant, and did not desire to engage in mercantile business, and must necessarily dispose of the goods at a disad-

Rice v. Hulbert.

vantage. Possibly Lynd would have allowed more if an invoice had been taken, but we infer that he was unwilling to wait for that. He was the creditor of an insolvent person, and, whether he had reliable knowledge of Lagerquist's circumstances or not, it was his right to consult his apprehensions, if he had any, and act accordingly. It may be regarded as certain that if he had resorted to judgment and execution, as the plaintiffs did, no one would have been much benefited by it. It is possible, of course, that the sale to Lynd was not made wholly for his protection, but that a secret interest was reserved to Lagerquist. We cannot say that our minds are entirely free from doubt upon the point; but the presumption is against fraud, and the evidence, we think, is not such as to justify us in saying that the presumption has been overcome.

AFFIRMED.

RICE v. HULBERT.

1. **Judgment: INTEREST ON: SIX PER CENT UNLESS OTHERWISE SPECIALLY STATED.** In order that a judgment on a contract drawing more than six per cent interest may draw the same interest, it must be so expressed in the judgment itself. Code, § 2078. So, where a plaintiff was entitled to have his judgment bear interest at ten per cent, but by oversight the rate of interest was not expressed in the judgment, *held* that he could not, without first having the error corrected by proper proceedings, enforce the judgment for more than its face and six per cent interest.
2. **Vendor and Vendee: PURCHASE SUBJECT TO LIEN: LIABILITY OF VENDEE.** One who purchases land subject to incumbrances, without expressly agreeing to pay the incumbrances, does not thereby bind himself to pay them. See cases cited in opinion.

Appeal from Mills District Court.

TUESDAY, DECEMBER 15.

Rice v. Hulbert.

ACTION in equity to enjoin defendant from selling a tract of land on execution issued on a judgment against one M. L. Rice, and from enforcing said judgment against said land. A temporary injunction was issued as prayed for in the petition, and on the final hearing of the cause the order was made perpetual. Defendant appeals.

Watkins, Williams & Wright, for appellant.

Lewis & Young, for appellee.

REED, J.—In August, 1873, James Micklewait recovered a judgment in the district court of Mills county against M.

1. JUDGMENT:
interest on :
six per cent
unless other-
wise specially
stated.

L. Rice on a promissory note for \$550.27, and for the foreclosure of a mortgage on eighty acres of land, given to secure said note. This judgment was subsequently assigned by Micklewait to the defendant, and after this assignment plaintiff received from M. L. Rice a conveyance of the land covered by the mortgage. The note on which the judgment was obtained bore ten per cent interest, but no rate of interest is expressed in the judgment. In September, 1883, defendant caused a special execution to issue on said judgment, and was proceeding to sell the land thereon when plaintiff instituted this suit. Plaintiff alleges in his petition that he has paid the full amount of the judgment, and that defendant has refused to satisfy the same of record. Defendant denies that the full amount of the judgment has been paid. He alleges that plaintiff, when he purchased the land from M. L. Rice, had notice of the fact that the note and mortgage on which said judgment was rendered bore ten per cent interest, and that the amount of the indebtedness evidenced by said judgment, with interest thereon at ten per cent from the date of the rendition of the judgment, was deducted from the purchase price of the land, and that plaintiff's agreement with M. L. Rice was that he would pay the amount of the indebtedness to defendant, together with the interest thereon at ten

per cent. It is also averred that the failure to express the rate of interest in the judgment was owing to an oversight or mistake of the clerk in entering it of record. Plaintiff has paid and defendant has received an amount of money which the former claims is sufficient to satisfy the judgment, computing the interest thereon at six per cent from the date of its rendition. There is some dispute between the parties as to whether the amount paid is sufficient for the purpose. We think, however, that a fair preponderance of the evidence shows that plaintiff has paid the amount of the judgment and six per cent interest thereon.

The important question between the parties is whether plaintiff, having paid that amount, is now entitled to have the judgment satisfied of record. By its terms the judgment bears but six per cent interest. It is provided by statute (Code, § 2078,) that "interest shall be allowed on all moneys due on judgments and decrees of any competent court or tribunal at the rate of six cents on the hundred, by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding ten cents on the hundred, by the year, which rate must be expressed in the judgment or decree." Under this provision, it is clear that, unless a different rate of interest is expressed in the judgment or decree, but six per cent can be collected on it. As the contract on which the judgment was rendered bore interest at ten per cent, Micklewait was entitled to a judgment bearing that rate, and, if the failure to express that rate in the judgment was owing to the oversight or mistake of the clerk, as is alleged, he had the right, doubtless, by timely and proper proceedings, to have the error corrected; and possibly defendant had the same right after he became the owner of the judgment. But these considerations are not now important. The correction never was made, nor have any proceedings been instituted looking to the correction of the judgment. The judgment, then, is con-

Rice v. Hulbert.

clusive of the rights of the parties under the contract on which it was based. It is, in effect, a judicial determination that the plaintiff therein was entitled to collect but six per cent interest on the indebtedness evidenced by it. As plaintiff, then, has paid the full amount of money which defendant was entitled by the terms of the judgment to collect, it is clear that the lien upon the land created by it is extinguished. It is insisted, however, that plaintiff knew when he purchased the land that the note and mortgage upon which the judgment was rendered bore ten per cent interest; and that, in effect, he agreed to pay the debt due defendant, together with the interest thereon at ten per cent, as part of the purchase price of the land; and that he is not entitled to have the judgment canceled until he performs this undertaking. Whether this result would follow as a conclusion from the facts alleged, we need not determine; for we think the evidence fails to establish those facts.

It is proven, we think, that plaintiff knew when he bought the land that defendant claimed that his debt bore ten per cent interest; but it is not proven that he expressly agreed to pay the debt, either principal or interest. He held a mortgage on the land which was junior to the judgment, and he took a conveyance of the land by quit-claim in satisfaction of his debt. There were other liens upon it, in addition to defendant's judgment, which were senior to his mortgage. It was to his interest to pay off these liens, but he did not expressly agree to pay them. He simply took the land subject to them. He did not thereby become bound to pay them. *Johnson v. Monell*, 13 Iowa, 300; *Aufrecht v. Northrup*, 20 Id., 61; *Hull v. Alexander*, 26 Id., 569; *Lewis v. Day*, 53 Id., 575. There are therefore no equities in defendant's favor created by the contract for the purchase by plaintiff of the land which will defeat his right to have the judgment canceled.

AFFIRMED.

2. VENDOR
and vendee:
purchase sub-
ject to lien:
liability of
vendee.

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO. V. SHEA,
COUNTY TREASURER, ET AL.

1. **Taxation in aid of Railroads: CONSTITUTIONALITY OF STATUTES:** CHAP. 123, LAWS OF 1876, AS AMENDED BY CHAP. 173, LAWS OF 1878. Chapter 123, Laws of 1876, as amended by chapter 173, Laws of 1878, providing for the taxation of cities, towns and townships to aid in the construction of railroads, *held* to be constitutional, on the authority of the former decisions of this court. See cases cited in opinion.
2. —: **CERTIFICATE OF TOWNSHIP CLERK TO COUNTY AUDITOR: FORM OF: WHAT IS SUFFICIENT.** Where a tax was voted by a township in aid of a railroad, under chapter 123, Laws of 1876, and the certificate thereof made by the township clerk to the county auditor did not show all the conditions upon which the tax was voted, as required by the statutes, except by reference to a copy of the notice of the election, which was attached to the certificate and marked and referred to as exhibit A, and so made a part of the certificate, but the board of supervisors regarded the certificate as sufficient, and levied the tax, and the road was actually built according to the terms of the vote, *held* that the collection of the tax would not be enjoined on the ground that the certificate was not sufficient in and of itself, without reference to the attached notice, to give the board jurisdiction to make the levy. *Minnesota and I. S. R'y Co. v. Hiams*, 53 Iowa, 501, distinguished.
3. —: **COMPLIANCE WITH CONDITION TO CONSTRUCT AND OPERATE ROAD.** Where a condition of a tax voted in aid of a railroad was that the road should be "constructed and operated" to a depot at a certain place by a given time, *held* that it was sufficiently complied with by the construction of the road to the given point by the time named, and the continuous operation of it thereafter, even though the road was not fully completed, and the depot was only a temporary one, and the service was not first class.
4. —: **TAX NOT FORFEITED BY LEASE OF ROAD.** A tax voted in aid of a railroad is not forfeited by a perpetual lease of the road made in good faith to another company. *Manning v. Mathews*, 66 Iowa, 675, distinguished.
5. —: **INCORPORATED TOWN VOTING WITH TOWNSHIP IN WHICH SITUATED.** When the question is whether a township shall aid in the construction of a railroad by voting a tax, all the voters of the township, including such as reside within an incorporated town which lies wholly or in part within the township, may lawfully vote at such election. Compare *Ryan v. Varga*, 37 Iowa, 80.
6. —: **UNDUE INFLUENCE UPON VOTERS: TAX VOID.** Where the citizens of a town appointed a committee to work up the voting of a railroad-aid tax in another township of the county, and the railroad com-

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

pany afterwards employed one of the same committee to do the same thing on its behalf, and he induced men to vote for the tax by offering to pay them fifty cents on the dollar for the certificates of taxes paid by them, *held* that the tax so voted was void on account of the undue influence so brought to bear upon the voters.

Appeal from Palo Alto Circuit Court.

TUESDAY, DECEMBER 15.

ACTION to enjoin the collection of taxes voted in aid of the Cedar Rapids, Iowa Falls & Northwestern Railroad Company. A part of the relief asked by the plaintiff was refused, and both parties appeal, but the plaintiff under the statute must be regarded as the appellant.

Geo. E. Clark and T. W. Harrison, for appellant.

Soper, Crawford & Carr and S. K. Tracy, for appellees.

SEEVERS, J.—Taxes were voted in six townships in aid of the Cedar Rapids, Iowa Falls & Northwestern Railway Company, and in five of the townships the district court held that the taxes were valid, and as to them the petition was dismissed on the merits. In Lost Island township the court held the taxes to be invalid, and the relief asked by plaintiff as to said taxes was granted. The plaintiff's appeal will be first considered, and it can be more intelligently done by determining in the order presented by counsel the several objections urged against the validity of the taxes.

I. They were voted under and in accordance, as is claimed, with the provisions of chapter 123 of the Acts of the Sixteenth General Assembly, as amended by chapter 173 of the acts of the Seventeenth General Assembly, and it is insisted that these statutes are unconstitutional for the same reasons as were urged in *Stewart v. Board of Supr's*, 30 Iowa, 9, and the comparatively late cases of *Renoick v. Davenport & N. W. R'y*, 47 Id., 511, and *Snell v. Leon-*

1. TAXATION
in aid of rail-
roads: con-
stitutionality
of statutes:
chap. 123,
Laws of 1876,
as amended
by chap. 173
Laws of 1878.

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

ard, 55 Id., 553. We are not disposed to enter upon the discussion of this question again, and deem it only necessary to say that the constitutionality of the statutes in question must be affirmed on the authority of the cases above cited.

II. The statute provides that the notice of the election shall "specify the time and place for holding the election, the line of railroad proposed to be aided, the rate per centum of tax to be levied, and whether the entire per centum voted is to be collected in one year, or one-half collected the first year and one-half the following year, and the amount of work upon said proposed railroad required to be completed before said tax shall be paid to the railroad company, and when the same shall be performed, and to what point said road shall be fully completed; * * * and the township clerk * * * shall forthwith certify to the county auditor the rate per centum of the tax thus voted by such township, * * * the year or years during which the same is to be collected * * * under the conditions and stipulations of said notice, together with an exact copy of the notice under which the election was held." Chapter 123, Laws 1876. It is not claimed that the notices do not in all respects comply with the statute, except as hereafter stated, but it is insisted that the certificates of the township clerk are materially defective. The particular defect insisted on is that the notices are not incorporated into and made a part of the certificate in that way, and that, without reference to the notice which is attached to the certificate, it fails to show the conditions and stipulations upon which the tax was voted. The certificates are substantially alike, and state the rate per centum of the tax voted; the road in aid of which the tax was voted; that the tax was to be levied on the assessment of 1881, and collected that year, on condition that the road should be constructed and operated from a point of connection with the Minneapolis & St. Louis Railway, in Humboldt, Iowa, to a

2. ———: certificate of township clerk to county auditor: form of: what is sufficient.

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

depot located within the incorporated town of Emmetsburg, and within one-half mile of the court-house in said town, on or before January 1, 1882. The certificates further state that the work of constructing the railway shall be commenced within ninety days from the second day of May, 1881, otherwise the tax to be wholly forfeited. A true copy of the notice of election hereto attached, marked "Exhibit A" and made a part hereof.

It will be conceded that all the conditions and stipulations upon which the tax was voted cannot be ascertained from the certificate of the township clerk, unless it is proper and competent to refer to the copy of the notice which is attached to the certificate. Appellant claims that no such reference can be made, and that the defect in the certificate is jurisdictional, and therefore the tax could not be legally levied. In support of this position, *Minnesota & I. S. R. Co. v. Hiams*, 53 Iowa, 501, is cited. The certificate in that case and the one at bar are substantially the same, but in the cited case the board of supervisors refused to levy the tax because the certificate of the township clerk was defective. The court was asked, in a *mandamus* proceeding, to compel the board to disregard the defect and levy the tax. This the court declined to do. In the case at bar the board of supervisors levied the tax, and must have, therefore, determined that the certificate was not defective. Taking the certificate, and the notice thereto attached and made a part of it, their sufficiency must be conceded, except as hereinafter stated. It is not a case, therefore, in which there was no certificate, but a defective one merely; and the board of supervisors, the tribunal called on to act, has determined that the certificate sufficiently complied with the law. This is a collateral attack on such determination, and therefore clearly, we think, is within the rule established in *Ryan v. Varga*, 37 Iowa, 78. Before levying the tax it was the province and duty of the supervisors to determine, among other things, that the requisite certificate from the township clerk was on file in

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

the office of the county auditor, and their determination cannot be impeached in this collateral proceeding. It must be remembered that the objection to the certificate is exceedingly technical, and while, it has been held that the board should not be compelled by *mandamus* to levy the tax notwithstanding such objection, we are unwilling to hold that their determination that the certificate was sufficient can or should be set aside in this proceeding. In considering the question under consideration, it should be conceded that the road was constructed in substantial compliance with the notice of the election, and that the tax-payers got precisely what they bargained for. This being so, we are not disposed to give force and effect to mere technical objections which did not affect the substantial rights of the parties.

III. The notices provide that the road shall be completed to Emmetsburg, in Palo Alto county, Iowa, "on or before July 1, 1882," and shall be "constructed and operated * * * to a depot located within the incorporated town of Emmetsburg, and within one-half mile of the courthouse in said town, on or before January 1, 1882," and therefore it is said that the conditions on which the taxes were voted have not been complied with. The notices, however, did not require that the road should be completed by January 1, 1882. It will be observed that the notices required that the road should be completed to the point named by July 1, 1882, and it is not claimed that this was not done; but it was required that the road should be constructed and operated to a depot at Emmetsburg by January 1, 1882. The road was constructed and operated to such point by that time. A depot was partially erected, but the road was not ballasted, and in other respects it could not be regarded as a first-class completed road. But, as we have said, the road was operated from that time continuously. The service, however, was not first-class, and the notice did not require that it should be. A building was used as a temporary depot,

3. —: compliance with condition to construct and operate road.

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

which the evidence shows to have been sufficient for the purpose for which it was used. Track was laid for nearly a mile beyond the depot. We are of the opinion that the road was constructed and operated to a depot at the place named in the notices by the first day of January, 1882. *Muscatine W. R. Co. v. Horton*, 38 Iowa, 33.

It is also urged that the notices fail to state where and to what point the road shall be completed. We are of the opinion that it does state such facts. The road was to be completed to Emmetsburg by July 1, 1882, and the amount of work to be done before the tax should be paid is also stated; for the notices state that the road shall be constructed and operated to a depot located at said place by January 1, 1882.

IV. The taxes were voted in May, 1881, and in June thereafter the road, in aid of which the taxes were voted, was leased in perpetuity to the Burlington, Cedar Rapids & Northern Railroad Company, and since its construction it has been operated by the last named company. The statute provides that the tax-payers are entitled to stock for the amount paid by them in the company in aid of which the taxes were voted; and it is provided by statute that when any railroad corporation shall have made contracts for the payment to it upon delivery of stock in such company, and shall, subsequent to such contracts, have changed its corporate name, or when the real ownership in the property, rights, powers and franchises has passed legally or equitably into any other company, no such contracts shall be enforced in law or equity until the tender or delivery of stock in the last named corporation or company. Code, § 1302. Inasmuch as the Burlington Company refused to issue stock to the tax-payers, it is insisted that the collection of the tax cannot be enforced. The name of the corporation in aid of which the taxes were voted has not been changed, and under the terms of the lease the corporate name of the company continues to exist, and it is required to so continue as long as the lease is in force, and

4. —: tax
not forfeited
by lease of
road.

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

we are unable to conclude that under the lease the real ownership of the property, rights, powers and franchises have passed to the Burlington Company.

The lease provides that the last named company shall take full possession of the property demised, and pay all taxes, and provide rolling stock sufficient to transact the business, and keep the same and the road in good condition, and pay to the lessor an annual rental therefor of 30 per cent of the gross earnings, which the lessee guarantied should amount to a sufficient sum to pay the semi-annual interest on certain bonds which were executed by the lessor, the proceeds of which were used in constructing the road. There is no sufficient evidence showing that this lease was not executed in good faith, or that it was not to the interest of the lessor to have executed it. We therefore cannot say, as a matter of law, that it was executed as a fraud upon the tax-payers. Nor can we say that the contract is any thing else than it purports to be on its face. We therefore must hold that it is a lease, and that both the legal and equitable title to the property remains in the lessor. For ought we can possibly know, the lease is exceedingly beneficial to the stock-holders in the lessor company, and they may realize more under the lease than they would have done if the lessor company had operated the road. For the reasons stated, the statute above quoted has no application to the present case. It is further claimed that the facts above stated bring the case within the rule established in *Manning v. Mathews*, 66 Iowa, 675; but it is evident that the cases are clearly distinguishable. In the cited case the road in aid of which the taxes were levied was sold and conveyed to another company. The road, therefore, belonged to and was the property of the purchaser.

V. Emmetsburg is an incorporated town, and a part of its territory is in the township of Emmetsburg, and a part

s. —: Incorporated town voting with township in which situated.

of the territory of the incorporation is in Freedom township. Elections were called in both of these townships, and the voters residing

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

on the territory of the corporation within Freedom township voted in that township, and those residing in Emmetsburg township voted in that township. It is insisted that the collection of the taxes in these townships cannot be enforced, because the statute contemplates that where a township embraces an incorporated town the whole township cannot participate in an election for the purpose of voting taxes in aid of the construction of a railroad. The argument is that the incorporated town may separately so vote, and so may the township. But, in our opinion, the statute does not so provide. The statute provides that any township or incorporated town may so vote. If a township embraces an incorporated town, and it is proposed that the township shall aid in the construction of the road, the voters in the corporation are entitled to vote at such election. It is possibly true that the voters in the corporation may impose such burden on themselves; but, as the township may do so, the voters in the corporation are clearly entitled to vote at such election. We understand this question to have been determined adversely to the appellant in *Ryan v. Varga*, 37 Iowa, 80.

VI. The defendants appealed from the decision of the court holding that the taxes voted in Lost Island township were invalid. The court, we presume, held that the collection of the taxes in this township could not be enforced because of the following fact: The citizens of the town of Emmetsburg appointed a committee to take charge of and work up the tax. George B. McCarty was one of such committee. Afterwards the railroad company entered into a contract with the persons so appointed, by the terms of which the company agreed to pay the persons composing the committee five per cent of all the taxes voted, to the amount of \$40,000, in consideration of which they were to procure petitions to be circulated, to see that elections were called, to look after the company's interests in said local-aid matters, and see that the voters were

6 —: undue influence upon voters: tax void.

The Chicago, Milwaukee & St. Paul R'y Co. v. Shea, County Treasurer, et al.

out at elections, and see that all necessary steps were taken to secure said local-aid." McCarty was at the election in said township, and made a proposition to the voters that if they voted the tax for the railroad they would pay them fifty cents on the dollar for each dollar they voted on tax. Or, as another witness testifies, the proposition was "that all who voted for the tax, when they paid it, and presented their certificates to a certain party here in town, they would buy the certificates and pay fifty cents on the dollar." This proposition only included resident tax-payers and voters. The evidence further shows that prior to the proposition the expression of the voters was against the tax. There were only fourteen votes cast at the election, and all were in favor of the tax. These voters, or some of them, testify that they intended to vote against the tax, but changed their minds after the proposition was made. Counsel for the defendants do not claim that the proposition made did not unduly influence the voters, but their contention is that McCarty made the proposition in his own behalf, and not for the company, and that he was not authorized to bind or compromise the company in this respect. Under the contract, as we read it, McCarty was an agent of the company, and fully authorized to do whatever he deemed necessary to obtain votes for the tax. For whom he made the proposition we are uncertain,—that is, who was to pay the tax-payers,—but this is immaterial. He made the proposition for the purpose of effectuating the purpose contemplated in the contract, and we think the corporation is bound by what he did. He was authorized and directed to see "that all necessary steps were taken to secure said local aid." His determination of what was necessary is binding on the company.

Each party must pay the cost made by him, and the judgment on both appeals is

AFFIRMED.

 Miller et al., Adm'rs, v. House & Laub et al.

MILLER ET AL., ADM'RS, V. HOUSE & LAUB ET AL.

1. **Promissory Note: SIGNATURE DENIED: BURDEN OF PROOF.** Where the signature to the note sued on was denied under oath, the burden was on plaintiff to establish that it was genuine. Code, § 2730.
2. —: **FIRM NAME SIGNED BY CLERK: AUTHORITY: EVIDENCE: CONDUCT OF PARTNER.** The note sued on was payable by a firm to one of the partners, and the payee indorsed it to plaintiffs' intestate; but it was shown that the firm name was signed to the note by a clerk whose general authority did not extend to signing notes for the firm. *Held* that the acceptance and indorsement of the note by the partner did not prove that the note was signed by authority of the firm. His acts of acceptance and indorsement, having been in his own behalf only, were not binding upon the firm.

Appeal from Crawford Circuit Court.

WEDNESDAY, DECEMBER 16.

ACTION on a promissory note. There was a trial to the court, and judgment was entered for defendants. Plaintiffs appeal.

Wright, Baldwin & Haldane, for appellants.

Shaw & Kuehule, for appellees.

REED, J.—The promissory note sued on purports to have been executed by the firm of House & Laub. It is payable to E. House or order, and it was indorsed by the payee to plaintiffs' intestate. The genuineness of House & Laub's signature to it was denied under oath. Plaintiffs proved that the signature of House & Laub was attached to the instrument by one C. E. Parks, who was in the employ of that firm as clerk and book-keeper; and that, in addition to keeping the books of the firm, he attended to their correspondence, and did the greater part of the other writing pertaining to their business, which was that of general merchants. There was no direct evidence, however, tending to prove that he was authorized to execute promissory notes or other contracts

67	737
106	672
67	737
117	161

Miller et al., Adm'rs, v. House & Laub et al.

in the name of the firm; nor was it shown that the note in suit was given in the course of the business of the firm. When plaintiffs offered the note in evidence the circuit court excluded it, on defendants' objection, on the ground that the signature was not yet shown to be the genuine signature of the firm.

This ruling is assigned as error, and the only question in the case is as to its correctness. The burden was on the plaintiffs to prove the genuineness of said signature. Code, § 2730. They were not entitled to introduce the note in evidence until they had established *prima facie* that the person who attached the signature to it had authority to bind the firm of House & Laub by that act. In our opinion, they have not done this. The fact that Parks kept the books of the firm, and attended to its correspondence, and did other writing pertaining to its business, does not imply that he had authority to sign its name to promissory notes or to execute other contracts in its name. It is contended, however, that, as House accepted the note and indorsed it to plaintiffs' intestate, he thereby warranted that the signature was genuine, and that, as he was a member of the firm whose obligation the note purported to be, this ought to be accepted as evidence against the firm that Parks had authority to execute the instrument in its name. It is true that the law implies a warranty by the indorser of a negotiable instrument of the genuineness of the signature to it. The indorsement, however, was the individual act of House. He did not assume by that act to bind the firm. The contract, then, which arises by implication from the act is his individual contract. The firm was not bound by it, and the same may be said with reference to his act of accepting the note. He accepted it for himself individually, and not for the firm; and the firm can be bound only by such acts as he assumes to do in its name or in its behalf. We think the ruling of the circuit court is correct, and it will be

AFFIRMED.

SUPPLEMENT.

[The following opinions did not come into my hands in time for insertion in their chronological order, and are therefore presented in the form of a supplement.—REPORTER.]

PETERSON V. ADAMSON ET AL.

1. Negligence: WANT OF SKILL IN AGENT: EVIDENCE UNDER ISSUES.

Where plaintiff sought to recover damages suffered through the negligence or want of skill in defendant's agent, who had charge of the business in which the injury occurred, and his skill was put in issue, and plaintiff had offered evidence to prove his want of skill, *held* that it was error to refuse the defendant the opportunity to prove the agent's skill, notwithstanding such skill, if proved, would be no defense, if he was in fact careless in the particular act complained of.

2. Evidence: ERROR IN EXCLUDING: MATERIALITY MUST APPEAR.

While this court cannot say that there was error in not allowing answers to questions, unless it is made to appear what facts were intended to be proved thereby, yet counsel need not state in terms what they expect to prove, if it sufficiently appears on the face of the record without such statement.

3. Practice in Supreme Court: STRIKING OUT AMENDED ABSTRACT.

An amended abstract filed by appellant, made necessary on account of a change of the record in the trial court upon appellee's motion, cannot be stricken out, even though no service thereof was made on appellee.

Appeal from Palo Alto District Court.

SATURDAY, DECEMBER 5.

THE plaintiff seeks to recover damages of the defendants for the value of a mare which he alleges was killed by the negligence of the defendants. The defendants were the owners and keepers of a stallion, and the plaintiff contracted with them to serve said mare with said stallion, and plaintiff alleges that in attempting to do so the defendants negligently

Peterson v. Adamson et al.

allowed said stallion to improperly enter said mare, by reason of which she was so injured that she died soon afterward. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendants appeal.

Soper, Crawford & Carr, for appellants.

T. W. Harrison and C. E. Cohoon, for appellee.

ROTHROCK, CH. J.—The defendants' stallion was not in their care nor under their control. He was attended by one Donald

Black, who had him in charge for the season. It appears that Black made contracts with the owners of mares for the service of the stallion, and he was in immediate charge of the horse at the time plaintiff's mare was injured. The defendants denied that they or their agent in charge of said stallion were guilty of any negligence, carelessness or want of care or skill, in handling said stallion while serving said mare.

1. NEGLIGENCE: want of skill in agent; evidence under issues.

The plaintiff, in his reply, alleged "that it requires skill and care to properly attend a stallion" and that defendants were negligent in not furnishing a suitable and skillful person to attend to said stallion. The plaintiff, to sustain the issues on his part, was asked the following question by his counsel: "State what kind of a person it requires to handle and care for a stallion of this kind in making service of mares." The question was objected to by defendants, but the objection was overruled, and the plaintiff answered: "Well, I should think it ought to be a good man; it hadn't ought to be a lame fellow and a cripple." The court instructed the jury upon the issue as follows: "It was the duty of the defendants to employ, in the management of the stallion, a man of such ability and skill to perform such labor in such a manner as like services are usually done by a man of ordinary prudence and care in like business." Black, the keeper of the stallion, testified in behalf of the defendants that he had thirty years'

Peterson v. Adamson et al.

experience in caring for and attending stallions, and defendants called two witnesses, both of whom testified that they had large experience in attending upon and managing stallions. One of these witnesses was the owner of a barn at which Black kept the stallion. This witness was asked the following question: "State what, if anything, you know of the skill and experience pursued by the said Black in the business of grooming and handling stallions." The other witnesses were asked these questions: "State if you saw much of Black's manner of handling a horse, manner of trying and covering a mare, last season." "State if you know what experience or skill Black had in attending a stallion while trying and serving a mare." All of these questions were objected to by the plaintiff as incompetent and immaterial, and the objections were sustained.

We think it is very plain that under the issue made in the pleadings and recognized in the instructions, and in view of the evidence introduced by the plaintiff bearing upon the want of skill possessed by Black, the court erred in refusing to allow the defendants to prove that he possessed the requisite skill. It is correct, as argued by counsel for appellee, that, even if he was skillful in his calling, yet if in the instance in question he did not exercise skill, but was negligent, the fact that he was skillful was no defense. But his general want of skill was directly put in issue, and as plaintiff insisted on proving his want thereof, the defendants should have been permitted to rebut the allegation and proof if they could do so. It is urged that the appellants cannot be heard to complain of these rulings, because the record does not show what they expected to establish by answers to the questions. It was not necessary for defendants' counsel to state in terms that they expected to prove by the witnesses that Black possessed the required skill. The issues as made by the pleadings, the testimony of the witness Black, and the testimony of the two witnesses to whom the questions were propounded.

2. EVIDENCE:
error in ex-
cluding:
materiality
must appear.

Hunt v. The Farmers' Insurance Company.

abundantly show that the defendants were endeavoring to establish the fact that Black was possessed of the proper skill and experience.

The plaintiff filed a motion in this court to strike out an amended abstract filed by appellants August 30, 1884. The motion will be overruled. The abstract was made necessary by reason of a motion made by appellee in the court below after the record was made up and the appeal taken. The record was thereby changed, and, to make the same complete in this court, an amended abstract was necessary. The fact that no service thereof was had on appellee does not authorize an order striking it from the files.

There are other questions presented by counsel for appellant which we need not determine. They are not such as will likely arise upon a new trial. For the error in excluding the evidence above referred to the judgment of the court below will be

REVERSED.

HUNT V. THE FARMERS' INSURANCE COMPANY.

1. **Justices' Courts: JURISDICTION OF NON-RESIDENT INSURANCE COMPANIES:** CODE, § 2584, 3507. Section 2584 of the Code confers jurisdiction upon a justice of the peace of an action brought on a policy of insurance insuring property within his county, where the loss occurs, although the principal office or place of business of the insurance company is in another county. Code, § 3507, distinguished.

Appeal from Humboldt Circuit Court.

WEDNESDAY, OCTOBER 7.

ACTION upon a policy of insurance, commenced before a justice of the peace. The suit was dismissed because it was not brought in the county where the defendant actually resided.

Hunt v. The Farmers' Insurance Company.

The judgment of the justice was affirmed by the circuit court, and the plaintiff appeals.

J. C. Raymond, for appellant.

Prouty & Taft, for appellee.

SEEVERS, J.—We are required to determine the following question: "Does section 2584 of the Code confer jurisdiction upon a justice of the peace in an action brought on a policy of insurance insuring property within his county, and where the loss occurred, when the principal office or place of business of the company is in another county than where the justice resides?"

Section 2584 of the Code is in these words: "Insurance companies may be sued in any county in which is kept their place of business, in which was made the contract of insurance, or in which the loss insured against occurred." That this section is broad enough to include actions before a justice of the peace we think must be conceded, unless there is some other statute which forbids that such a construction should be adopted. The powers and jurisdiction of justices of the peace are defined in title 21 of the Code, and it is therein provided that justices of the peace do not have jurisdiction over actual residents of some other county, except as provided in said chapter. Code, § 3507.

Section 2584 forms a part of title 17 of the Code, but it originally was a part of chapter 95 of the acts of the Fourteenth General Assembly. The title of chapter 95 is "An act providing the place of bringing suits in certain cases," and consists of five sections, three of which are now sections 2582, 2583 and 2584 of the Code. It cannot be doubted that these sections embraced actions before a justice of the peace, for the language employed clearly includes all courts and all suits in whatever court brought. This being so, the mere fact that the codifiers placed the statute enacted in 1872

Hunt v. The Farmers' Insurance Company.

in title 17 of the Code, and such codification was adopted by the General Assembly, should not have the effect to limit the scope and meaning of the statute. If the section be now read and construed by itself, it clearly embraces suits before justices of the peace; and, as it was enacted since section 3507 of the Code, and then was again re-enacted when the Code was adopted, and while each title of the Code was separately enacted, still the whole Code should, for the purposes of construction, be regarded as having been enacted at the same time, and therefore sections 2584 and 3507 must be read and construed together, and such construction must be adopted, if consistent with the language used, as will give force and effect to both sections. This being done, it is clear that section 2584 cannot have full force and effect unless justices of the peace have jurisdiction of actions against insurance companies in the cases contemplated in the statute. Therefore section 3507 should be limited to natural persons who are actual residents of some other county than that in which the justice resides.

We are of the opinion that the foregoing questions must be answered in the affirmative.

REVERSED.

STATUTES AND RULES
REGULATING THE PRACTICE
OF THE
SUPREME COURT
OF THE
STATE OF IOWA.

REVISED AND ADOPTED AT THE JUNE TERM, 1886.

ORDER OF COURT.

TUESDAY, JUNE 2, 1886.

Ordered: That the revised rules this day approved by the court shall be regarded as adopted when transcribed and filed with the clerk, and shall take effect when published by the clerk.

I.—OF THE ORGANIZATION OF THE COURT.

SECTION 1. The supreme court consists of five judges elected in the manner prescribed by law, the senior judge being chief justice.

SEC. 2. The presence of three judges is necessary to constitute a quorum. adjourn- for the transaction of business, but one alone may adjourn ment by minority. from day to day, or to any particular day, or until the next term. [Code, § 139.]

SEC. 3. The officers of the court are the attorney-general,¹ the clerk² and officers of court. the reporter,³ who are elected in the manner prescribed by law; the bailiffs⁴ appointed by the court, and the attorneys and counselors-at-law admitted to practice therein.⁵

II.—OF THE JURISDICTION OF THE SUPREME COURT.

SEC. 4. The supreme court has an appellate jurisdiction over all judgments and decisions of the superior, the circuit and district courts from which appeals are allowed by law, as well in cases of civil actions, properly so called, as in proceedings of a special or independent character and in criminal cases. [Code, § § 3163, 4520. Laws 1876, chap. 143, § 17; Laws 1882, chap. 24, § 7.]

SEC. 5. The supreme court may also review the following orders made by the circuit or district court, or the superior court of a city:
What orders may be reviewed on appeal.

1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken.
2. A final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment.
3. When an order grants or refuses, continues or modifies a provisional remedy, or grants, refuses, dissolves, or refuses to dissolve an injunction or attachment, when it grants or refuses a new trial, or when it sustains or overrules a demurrer.
4. An intermediate order involving the merits, and materially affecting the final decision.
5. An order or judgment on *habeas corpus*.

If any of the above orders are made by a judge of the district, circuit or superior court, they are in that case reviewable in the same way as if made by the court. [Code, § 3165, Laws 1876, chap. 143, § 117.]

SEC. 6. The supreme court may also, in its discretion, prescribe rules for allowing appeals on such other intermediate orders or decisions as they may think expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard proceedings in the trial in chief in the court below. [Code, § 3166.]

SEC. 7. The supreme court has a general supervision over the district, superior and circuit courts, and all other inferior judicial tribunals, to prevent and correct abuses, where no other remedy is provided by law. [Constitution, Art. 5, § 4.]

(1.) Const. 1857, art. 5, § 12; Rev. 1860, ch. 11; Laws 1862, ch. 156; Laws 1864, ch. 123; Laws 1868, ch. 133, § § 1 and 28; Id., ch. 173, § 12; Joint Res. 1868, No. 21; Laws 1876, ch. 7.

(2.) Rev. 1860, ch. 110; Laws of 1866, ch. 83.

(3.) Laws 1861, ch. 22; Laws 1866, ch. 89.

(4.) Acts, 1836, ch. 59, § 2.

(5.) Sections 103-112 hereof.

SEC. 8. The supreme court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until the mandates are obeyed. [Code, § 3200.]

SEC. 9. The supreme court may issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction. [Code, § 3172.]

III.—OF THE TERMS OF THE SUPREME COURT.

SEC. 10. The supreme court shall be held at the seat of government, and shall convene and hold four terms each year, one of which shall commence on the first Tuesday of March, one on the first Tuesday of June, one on the first Tuesday of October, and one on the first Tuesday of December. Each of said terms of court shall be for the submission and determination of causes, and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session, so far as practicable, until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where a re-argument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court. [Acts 1886, Chap. 59, § 1.]

IV.—OF APPEALS TO THE SUPREME COURT.

1. *In Civil Cases.*

SEC. 11. No appeal to the supreme court shall be taken except within six months from the rendition of the judgment or order appealed from. Unless the case involves an interest in real estate, no appeal, where the amount in controversy, as shown by the pleadings, does not exceed one hundred dollars, will be considered, except to dismiss the same, unless the trial judge certifies the question of law upon which the decision of this court is desired. And no other question, except the one so certified, shall be considered. [Code, § 3173.]

SEC. 12. An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript; whereupon the clerk, at the written request of either party, shall prepare a transcript of the record in the case, or as much thereof as the appellant in writing has directed, to which shall be appended copies of the notices of appeal and of the supersedeas bond, if any; and shall, before the day the cause is set for hearing, transmit the same by mail or express to the clerk of the supreme court. But causes shall be submitted upon the abstracts of the parties, except where a controversy arises as to the record. In such case the controversy shall be determined by reference to the transcript; but the appellant shall have a reasonable time after the necessity for a transcript appears to file a transcript, where one has not already been filed.

SEC. 13. An appeal is taken by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from the specific part thereof, defining such part. [Code, § 3178.]

SEC. 14. An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb or delay the rights of any party to any judgment or part of a judgment, or order, not appealed from, but the same shall proceed as if no such appeal had been taken. [Code, § 3177.]

SEC. 15. The notices of appeal must be served thirty days, and the cause filed and docketed at least fifteen days, before the first day of the next term of the supreme court, or the same shall not then be tried, unless by consent of parties. If the appeal is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term. [Code, § 3130.]

SEC. 16. In cases in which there was a default in the court below, and no personal service on defendant, and no appearance by him, the plaintiff may appeal, and make service of the notice of appeal in the same manner that service of original notice is made on non-resident defendants. If the appellee is a non-resident, but has an agent residing in the state, the notice may be served upon such agent, and such service shall take the place of publication in a newspaper. The proof of such service shall be made in the manner prescribed for proof of service of original notice on non-resident defendants. [*McClellan v. McClellan*, 2 Iowa, 312.]

SEC. 17. The cause shall be docketed as it was in the court below, and the party taking the appeal shall be called appellant, and the other party the appellee. [Code, § 3171.]

SEC. 18. At least thirty (30) days before the day assigned for the hearing of a cause, the appellant shall serve upon the attorney for each appellee a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision, (said abstract to be prepared as required by sections 97, 98 and 99.) He shall also, fifteen (15) days before the first day of the term for which the cause is to be docketed for trial, file with the clerk ten (10) copies of said abstract, and no cause will be heard until thirty (30) days after such service and fifteen (15) days after such filing with the clerk, nor shall it be docketed unless this and other rules shall be complied with. In case of cross appeals the party first giving notice of appeal shall, under this rule, be considered the appellant.

SEC. 19. If the appellee's counsel shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving the same, deliver to the appellant's counsel one printed copy, and to the clerk of the court ten printed copies, of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision.

SEC. 20. In an action by ordinary proceedings, and in an action by equi-

The records to be certified. table proceedings tried upon oral evidence, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein (except subpoenas, depositions and other papers which are used as mere evidence) are to be deemed part of the record. But in an action by equitable proceedings tried upon written evidence, the depositions, and all papers which were used as evidence, are to be certified up to the supreme court, and shall be so certified, not by transcript, but in their original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified, unless by direction of the appellant. If so certified, when not material to the determination of the appeal, the court may direct the person blamable therefor to pay the costs thereof. [Code, § 3184.]

SEC. 21. If the transcript has not been sent up, or the appellant does not file the same, or does not file an abstract when the same should be filed as herein provided, the appellee may file the transcript, and may on motion have the appeal dismissed or the judgment affirmed, as the court from the circumstances of the case shall determine; but no appeal shall be dismissed or judgment of the court below affirmed because the cause was not docketed, or transcript or abstract filed, if it be made to appear that the appeal was taken in good faith and not for delay, or if, from the conduct of the appellee or his counsel, appellant was induced to believe that no motion to dismiss or affirm would be made. [Code, § § 3181, 3182, Chap. 56, Acts 1874.]

SEC. 22. A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court. [Code, § 3174.]

SEC. 23. If the other co-parties refuse to join, they can not, nor can any of them, take an appeal afterwards; nor shall they derive any benefit from the appeal, unless from the necessity of the case. [Code, § 3175.]

SEC. 24. Unless they appear and decline to join, they shall be deemed to have joined, and shall be liable for their due proportion of costs. [Code, § 3176.]

SEC. 25. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the cause may proceed. The court may also, in such case, grant a continuance, when such a course will be calculated to promote the ends of justice. [Code, § 3211.]

SEC. 26. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant, and filed, they must be verified by affidavit. [Code, § 3212.]

SEC. 27. The appellee may, by answer filed and verified by himself, agent

Proceedings to show appeals improperly taken. or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply, likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court. [Code, § 3213.]

SEC. 28. The service of all notices of appeal, or in any way growing out of such right, or connected therewith, and all notices in the supreme court, shall be served in the way provided for the service of like notices in the district court, and they may be served by the same person and returned in the same manner, and the original notice of appeal must be returned, immediately after service, to the office of the clerk of the court where the suit is pending. [Code, § 3214.]

SEC. 29. It shall be the duty of the appellant to file a perfect transcript, and to that end the clerk of the court below must at any time, on his suggestion of the diminution of the record and on payment of fees, certify up any omitted part of the record, according to the truth, as the same appears in his office of record; and such applicant shall not be entitled to any continuance, in order to correct the record, unless it shall clearly appear to the court that he is not in fault, subject to which requirement either party may, on motion before trial day, obtain an order on the clerk of the court below, commanding him to transmit at once to the supreme court a true copy of such imperfect or omitted part of the records as shall be in general terms described in the affidavit or order. Such motion must be supported by affidavit, unless the diminution be apparent, or admitted by the adverse party, and must not be granted unless the court be satisfied that it is not made for delay. [Code, § 3185.]

SEC. 30. Where a view of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode, to the clerk of the supreme court, who shall hold the same subject to the control of the court. [Code, § 3209.]

SEC. 31. An appeal shall not stay proceedings on the judgment or order, Supersedeas. or any part thereof, unless a supersedeas is issued, and no appeal or supersedeas shall vacate or affect the lien of the judgment appealed from. [Code, § 3186.]

SEC. 32. A supersedeas shall not be issued until the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also, that he will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents, or hire, or damages to property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as

to secure the part superseded alone. When such bond has been approved by the clerk and filed, he shall issue a written order commanding the appellee and all others to stay proceedings in such judgment or order, or on such part as is superseded, as the case may be. [Code, § 3186.]

SEC. 33. If the appellee believe the supersedeas bond defective, or the **Motion to discharge** sureties insufficient, he may move the supreme court, if in **supersedeas.** session, or in its vacation, on ten days' written notice to the appellant, may move any judge of said court, or the judge of the court where the appeal was taken, to discharge the supersedeas; and if the court, or such judge, shall consider the sureties insufficient, or the bond substantially defective in securing the rights of the appellee, the court or such judge shall issue an order discharging the supersedeas, unless a good bond with sufficient sureties be executed by a day by him fixed. The order, if made by a judge, shall be in writing, and be signed by him, and upon its filing, or the filing of a certified copy of the order when made in court, in the office of the clerk of the court from which the appeal was taken, execution and other proceedings for enforcing the judgment or order may be taken, if a new and good bond is not filed and approved by the day fixed as aforesaid. [Code, § 3188.]

SEC. 34. But another supersedeas may be issued by the clerk upon the **New supersedeas.** the execution before him of a new and lawful bond, with sufficient sureties, as hereinbefore provided. [Code, § 3189.]

SEC. 35. If the judgment or order is for the payment of money, the **pen-** **Amount penalty.** alty shall be in at least twice the amount of the judgment and costs; if not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars. [Code, § 3190.]

SEC. 36. The taking of the appeal from a part of a judgment or order, **Extent of super-** and the filing of a bond as above directed, does not cause **deas.** a stay of execution as to any part of the judgment or order not appealed from [Code, § 3191.]

SEC. 37. If execution has issued prior to the giving of the bond above **Countermanding** contemplated, the clerk shall countermand the same. **execution.** [Code, § 3192.]

SEC. 38. Property levied upon and not sold at the time such counter- **Property delivered.** mand is received by the sheriff shall forthwith be delivered up to the judgment debtor. [Code, § 3193.]

2. In Criminal Actions.

SEC. 39. The mode of reviewing in the supreme court any judgment, **What may be ap-** action or decision of the district court in a criminal cause **pealed.** is by appeal. [Code, § 4520.]

SEC. 40. Either the defendant or the state may take an appeal. [Code, **Who may appeal.** § 4521.]

When appeal may SEC. 41. No appeal can be taken until after judgment, **be taken.** and then only within one year thereafter. [Code, § 4522.]

SEC. 42. An appeal is taken, by the party taking it, or the attorney of **How taken: notice.** such party, serving on the adverse party, or on the attorney of the adverse party who acted as attorney of record in the district

court at the time of the rendition of the judgment, and also on the clerk of the district court by which the judgment was rendered, a notice in writing of the taking of the appeal from the judgment. [Code, § 4523.]

SEC. 43. The appeal is deemed to be taken when the notices thereof, **When perfected.** required by the last section, are filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof indorsed thereon, or annexed thereto. [Code, § 4524.]

SEC. 44. When an appeal is taken, it is the duty of the clerk of the **Transcript.** court in which the judgment was rendered, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, (except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and the minutes of the evidence of the witnesses examined before the grand jury,) and of all records made in the record book, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court. [Code, § 4525.]

Appeal by state not superseded. **SEC. 45.** An appeal taken by the state in no case stays the operation of the judgment in favor of the defendant. [Code, § 4527.]

SEC. 46. An appeal taken by the defendant does not stay the execution **Supersedes in bailable cases.** of the judgment unless bail be put in, except as provided in the next section. [Code, § 4528.]

SEC. 47. Where the judgment is imprisonment, in the penitentiary and **Imprisonment in penitentiary: order to detain prisoner.** an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and the fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it. [Code, § 4529.]

SEC. 48. When an appeal is taken by the defendant, in a bailable case, **Discharge on bail.** and bail is put in, it is the duty of the clerk to give forthwith to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal had been taken and bail put in, and the sheriff or other officer having the defendant in custody must, upon the delivery of such certificate to him, discharge the defendant from custody, where imprisonment forms any part of the judgment, and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court, who issued it, the execution or certified copy of the entry of judgment, under which he acted, with his return thereto, if such execution or certified copy has been issued, and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment on the appeal. [Code, § 4530.]

SEC. 49. When several defendants are indicted and tried jointly, any one **Joint defendants: appeal.** or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [Code, § 4526.]

SEC. 50. The party taking the appeal is known as the appellant, the **Title of action.** adverse party as the appellee, but the title of the action is not changed in consequence of the appeal; it shall be docketed in the supreme court as it was in the district court. [Code, § 4531.]

V.—OF THE TRIAL, DECISION AND EXECUTION.

1. *In Civil Cases.*

SECTION 51. In cases where an assignment of errors is necessary the same should be served upon the opposite party or counsel at the time the abstract is served, and should be filed with the clerk of the court at the time the abstract is filed. If served or filed later than herein provided, the assignment may, on motion, be stricken from the files, but the court in its discretion may waive the failure, but not without the imposition of terms if it appears that the appellee has been subjected to any inconvenience by the failure. An assignment of error of error. need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to. Among several points in a demurrer or in a motion or instruction or rulings in an exception, it must designate which is relied upon as error; and each must be designated in a distinct assignment; and the court will only regard errors which are assigned with the required exactness; but the court must decide on each error assigned.

SEC. 52. (1) Motions made in a cause after judgment, or after the time assigned for the hearing of causes from the district from which it was appealed; will be heard only upon proof of service of reasonable notice of such motion upon the adverse party.

(2) All motions must be filed with the clerk and served, by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or counsel, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or counsel, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract. But in such cases timely notice of such motions shall be given to the opposite attorneys.

(3) Arguments in support of motions, if any, must be filed in writing before the morning of the day set for hearing of the cause, and served by copy upon the opposite party or counsel when the motion is served, and arguments in resistance, if any, must be filed in writing before the morning of the day set for hearing of the cause, and served by copy on the opposite party or counsel when the papers in resistance are served. The above rule shall not apply to motions for continuance, as to time of service.

SEC. 53. To entitle an appellant to submit his case either orally or in print, he must serve copies of his brief of points and authorities or arguments on counsel for each of the appellees at least thirty (30) days before the day assigned for the hearing of the case. The appellee shall serve copies of his brief or argument upon counsel for each appellant at least ten (10) days before the hearing; and the reply, if in print, shall be served at least three (3) days before the case is to be finally submitted. Each party shall file with the clerk ten (10) copies of each brief or argument before the case is so submitted. A failure to comply

with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance, or to have the case submitted at his option upon the brief and argument on file when the default occurred. All briefs and arguments shall be prepared and printed as required by section 96 hereof.

SEC. 54. All arguments in addition to oral ones shall be in print; proper *Service of briefs.* evidence of the service upon opposing counsel of printed matter in a cause shall be filed therewith; and the clerk shall note upon the docket the date of each service. All manuscripts and printed arguments shall be filed with the clerk, and he shall not transmit to the judges any papers not served and filed in time under the rules, nor shall any argument or brief be considered which does not go through the hands of the clerk. No cause shall be entered as submitted until the arguments are finally and actually concluded.

SEC. 55. Written notice of intention to argue a case orally shall be served *Oral argument, notice for.* upon the counsel of the opposite party ten days before the first day of the term, and failure to serve such notice shall deprive the party of the right to argue orally.

SEC. 56. Only two counsel will be heard on either side, and no oral argu- *Limitation: num- ber of counsel.* ment shall exceed one hour in length, unless an extension of time be granted before the argument is commenced.

SEC. 57. When the appeal presents to the court only questions of law *Which party opens and closes argu- ment.* upon rulings of the court below, the appellant shall open and close the argument, but when the trial in the supreme court is *de novo* of questions of fact, the party having the burden of proof shall open and close, and, as to printed briefs and arguments, shall observe the rules requiring the filing of such briefs and arguments by appellants.

SEC. 58. At the commencement of each term the causes will be *Calling causes.* called in their order, but no cause will be tried on the first calling.

SEC. 59. The opinions of the court on all questions reviewed on appeal, *Opinions of the court.* as well as such motions, collateral questions and points of practice as they may think of sufficient importance, shall be reduced to writing and filed with the clerk of the court.

All dissenting opinions must be written and filed in the same manner.

The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which, of the judges dissented from the decision. [Code, § 143, 144.]

SEC. 60. If the decision, in the judgment of the court, is not of sufficient *Opinion when reported.* general importance to be published, it shall be so designated, in which case it shall not be reported in the reports, and no case shall be reported except by order of the full bench. [Code, § 145.]

SEC. 61. The supreme court may reverse or affirm the judgment or order *Judgment which may be rendered.* below, or the part of either appealed from, or may render such judgment or order as the court below or judge should have done, according as it may think proper. [Code, § 3194.]

SEC. 62. The supreme court, where it affirms the judgment, shall, also, if

Judgment against sureties. the appellee moves therefor, render judgment against the appellant and his sureties on the bond above mentioned, for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [Code, § 3195.]

SEC. 63. Upon the affirmance of any judgment, or order for the payment of money, the collection of which, in whole or in part, has been superseded by bond, as above contemplated, the court shall award to the appellee damages upon the amount superseded, and, if satisfied by the record that the appeal was taken for delay only, must award such sum as damages, not exceeding fifteen per cent thereon, as shall effectually tend to prevent the taking of appeals for delay only. [Code, § 3196.]

SEC. 64. If the supreme court affirm the judgment or order, it may send the cause to the district court to have the same carried into effect, or it may itself issue the necessary process for this purpose, and direct such process to the sheriff of the proper county, according as the party thereto may require. [Code, § 3197.]

SEC. 65. If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or court below may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property, or the value thereof. [Code, § 3198.]

SEC. 66. Executions issued from the supreme court shall be the same as those from the district court, attended with the same consequences, and shall be returnable in the same time. [Code, § 3215.]

SEC. 67. In cases in which the judgment below is affirmed in this court, the parties in whose favor the judgment is affirmed may have execution either from this court or the court below. In case of an execution from this court, if the process of garnishment is served upon the execution defendant, either principal or surety, the sheriff, in addition to his return, shall return a copy of the execution and his returns to the district court or circuit court from which the cause was appealed, and all issues of fact which may arise in said garnishment process shall be tried by that court.

SEC. 68. The court shall hear all the cases docketed, when not continued by consent, or for cause shown by the party, and the party may be heard orally or otherwise, in his discretion. [Code, § 3204.]

SEC. 69. No cause is decided until the opinion in writing is filed with the clerk. [Code, § 3205.]

SEC. 70. No procedendo, except in criminal cases, and in cases where petitions for rehearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon an order of one of the justices of the court, upon cause shown.

SEC. 71. Decrees to be entered in this court shall be prepared by the counsel of the parties in whose favor they are rendered. Copies shall be served on the opposite counsel and filed in the court within twenty day

after counsel preparing them shall have received notice of the decision in the cause in which they are entered.

SEC. 72. When, by the decision of this court, a decree is to be entered in this court at the option of either party, such option shall be declared and a decree furnished under the above rule, within twenty days from the date at which counsel required to prepare the decree received notice of the decision.

SEC. 73. If a cause be remanded to the inferior court to be carried into effect, such decision and the order of court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court in that district. [Code, § 3206.]

2. In Criminal Actions.

SEC. 74. Appeals in criminal cases shall be docketed in the supreme court for trial at the commencement of that portion of the term which has been assigned for trying causes from the judicial district from which the appeal comes, which is twenty days after the date of the certificate of the transcript from the clerk of the district court, and if the appellant does not file his transcript by that time with the clerk of the supreme court, the appellee may file his and have the case docketed. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term. [Code, § 4532.]

SEC. 75. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [Code, § 4533.]

SEC. 76. An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected within a reasonable time, and the supreme court must direct how it shall be corrected. [Code, § 4534.]

SEC. 77. No assignment of error, or joinder in error, shall be necessary. [Code, § 4535.]

SEC. 78. The defendant shall be entitled to close the argument. [Code, § 4536.]

SEC. 79. The opinion of the supreme court must be in writing, filed with its clerk and recorded. [Code, § 4537.]

SEC. 80. If the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record and, without regard to technical errors or defects which do not affect the substantial rights of parties, render such judgment on the records as the law demands. It may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it. [Code, § 4538.]

SEC. 81. If the appeal was taken by the state, the supreme court cannot reverse the judgment or modify it so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision.

ion shall be obligatory on the court below, as the correct exposition of the law. [Code, § 4539.]

Judgment of reversal. SEC. 82. If a judgment against the defendant be reversed, without ordering a new trial, the supreme court must direct, if the defendant be in custody, that he be discharged, or, if he be admitted to bail, that his bail be exonerated, or, if any money be deposited instead of bail, that it be refunded to him. [Code, § 4540.]

Judgment of affirmance. SEC. 83. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution, as the supreme court shall direct, except as hereinafter provided. [Code, § 4541.]

Record of judgment and proceeding. SEC. 84. When a judgment of the supreme court is rendered it must be recorded, and a certified copy of the judgment must be forthwith remitted to the clerk of the court below in which the judgment appealed from was rendered, with proper instructions, and a copy of the opinion, in such time, and in such manner, as the supreme court may, by rule, prescribe. [Code, § 4542.]

When jurisdiction ceases. SEC. 85. After the certified copy of the entry of the judgment of the supreme court, and its instructions, have been remitted, as provided in the preceding section, the supreme court has no further jurisdiction of the proceedings therein, and all proceedings which may be necessary to carry the judgment of the supreme court into effect must be had in the court to which it is remitted, or by the clerk thereof, except as provided in the next two sections. [Code, § 4543.]

Certified judgments: when authorized. SEC. 86. Unless where some proceedings in the court below are directed by the supreme court, a copy of the certified copy of the judgment of the supreme court, with its directions, certified by the clerk of the court below, to whom the same has been transmitted, delivered to the sheriff or other proper officer, shall authorize him to execute the judgment of the supreme court, or take any steps to bring the proceedings to a conclusion, except as provided in the next section. [Code, § 4544.]

Deduction of imprisonment. SEC. 87. If a defendant, who has been imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment shall be deducted by the court below from the period of imprisonment to be fixed on the last verdict of conviction. [Code, § 4545.]

VI.—REHEARING.

Time for filing. SEC. 88. No petition for rehearing shall be filed after sixty days from the filing of the opinion of this court.

Notice of petition for rehearing. SEC. 89. Written notice of intention to petition for rehearing shall be served on the opposite party and clerk of the supreme court within thirty days after the filing of the opinion, and if no such notice is served, the petition for rehearing shall not be filed after expiration of such thirty days.

Argument—petition for rehearing. SEC. 90. The petition for rehearing, if there be no oral argument, shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so

indicate to the other party, and he may make reply within such time as said court shall allow. If the petitioner desire to make an oral argument in support of his petition, he shall indorse in writing or print a notice upon his argument or brief, stating that he will ask to be heard orally, which shall be served on the opposite party and deposited with the clerk. The cause shall then be placed upon the docket for the next term, being not less than twenty days after the filing of the petition, and the petitioner shall have the right to be heard orally at the next term, or at any term to which the case may be continued. [Laws 1882, Chap. 144, amending Code, § 3202.]

SEC. 91. All petitions for rehearing shall be printed as required by section 96 hereof, and a copy shall be delivered to the attorney of the adverse party, and, if there be more than one, to the attorney of each, and nine copies to the clerk of this court.

SEC. 92. The opinions announcing the decisions of this court in cases wherein petitions for rehearing are filed, shall be printed by the petitioners, and copies thereof shall accompany the printed copies of the petitions for rehearing filed with the clerk, or served on the opposite party. [Oct. 2, 1879, Ordered, that rule 92 be suspended in its operation in all cases wherein the opinions of the court are published in the *Northwestern Reporter*, before the petitions for rehearing are filed. Counsel in such cases being required to refer to the number and page of the *Reporter*, in which the opinions are printed.]

SEC. 93. If a petition for rehearing be filed, the same shall suspend the decision or procedendo, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which cases such decision and procedendo shall be suspended until after final arguments. [Laws 1882, Chap. 144, amending Code, § 3201.]

VII. OF COSTS.

SEC. 94. The appellant may be required to give security for costs, under the same circumstances as those in which plaintiffs in civil actions in the court below may be so required. [Code, § 3210.]

SEC. 95. When the parties or their attorneys shall furnish printed Costs: taxation of. abstracts, briefs, arguments and petitions for rehearing, in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, tax the same to the party making them, without reference to the disposition of the case.

VIII.—OF PREPARING TRANSCRIPTS AND ABSTRACTS, AND PRINTING ABSTRACTS, BRIEFS, ARGUMENTS AND PETITIONS FOR REHEARING.

SEC. 96. All abstracts, briefs, arguments and petitions for rehearing shall be printed upon unruled writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches, but the type in which extracts are printed may be small pica solid, or brevier with leaded lines.

The first page of the abstract, brief or argument, shall show the title of the cause, designating the appellant and the appellee, the term of the supreme court to which the appeal is brought, the court from which the appeal is taken, and the names of the counsel for both the appellant and appellee.

SEC. 97. The abstract must be accompanied by a complete index of its contents, and must show where the papers and entries therein mentioned may be found in the transcript as well as in the abstract.

SEC. 98. Abstracts of records shall be made substantially in the following form:

IN THE SUPREME COURT OF IOWA,
DECEMBER TERM, 18..

JOHN DOE, <i>Appellant</i> ,	}	Appellants Abstract of Record
<i>vs.</i> RICHARD ROE, <i>Appellee</i> .		(" In Equity" or " At Law.")

Appeal from the Judgment of the Van Buren District Court.

J. C. K., *for the Appellant.*

H. H. S., *for the Appellee.*

On the ...day of....., 18.., the plaintiff filed in the Van Buren District Court a

PETITION

stating his cause of action as follows:

(Set out all of petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example, if the exhibit be a deed or mortgage and no question is raised, as to the acknowledgment, omit the acknowledgment.)

When the defendant has appeared it is useless to encumber the record with the original notice, or the return of the officer. Append to the abstract of each paper a reference to the page of the transcript on which it will be found.)

On the ...day of....., A. D. 18.., the defendant filed a

DEMURRER

to said petition setting up the following grounds:

(State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue.)

And on the....day of... .., 18.., the same was submitted to the court, and the court made the following rulings thereon:

APPENDIX.

(Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract, but it should continue.)

And on the.....day of....., 18..., the defendant filed his

ANSWER

to the petition, setting up the following defenses:

(Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition.

Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issue joined, proceed.)

On the....day of....., 18..., said cause was tried by a jury (or the court, as the case may be) and on trial the following proceedings were had:

(Set out so much of the bill of exceptions as is necessary to show the ruling of the court to which exceptions were taken during the progress of the trial.)

INSTRUCTIONS.

After the evidence and the arguments of counsel were concluded, the plaintiff (or defendant, as the case may be) asked the court to give each of the following instructions to the jury.

(Set out the instructions referred to, and continue),

which the court refused as to each instruction, to which said several rulings the plaintiff (or defendant) excepted at the time, and thereupon the court gave the following instructions to the jury:

(Set out the instructions.)

To the giving of those numbered (give the number) and to the giving of each thereof the plaintiff (or defendant) at the time excepted.

VERDICT.

On the.....day of....., 18..., the jury returned into court with the following verdict:

(Set out the verdict.)

MOTION FOR NEW TRIAL.

On theday of....., 18..., the plaintiff (or defendant) filed a motion praying the court to set aside the verdict and grant a new trial, upon the following grounds:

(Set out the grounds aforesaid for the new trial.)

On the.....day of....., 18..., the court made the following ruling upon said motion:

(Set out the record of the ruling) to which the plaintiff (or defendant) at the time excepted.

JUDGMENT.

On the.....day of....., 18..., the following judgment was entered:

(Set out the judgment entry appealed from.)

On the.....day of....., 18..., the plaintiff perfected an appeal to the supreme court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

(If supersedeas bond was filed, state the fact.)

ASSIGNMENT OF ERRORS.

And the appellant herein say there is manifest error on the face of the record in this:

(Set out the errors assigned.)

(To the abstract of each paper and entry append a reference to the page of the transcript on which it will be found. This will not be necessary when the case is submitted on the printed abstract without the transcript.

This out line is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no formula could be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the questions to be decided, and omit everything else.)

SEC. 99. The printed brief and argument shall state in divisions thereof, properly numbered, the several propositions of law claimed by the party making such brief or argument to be involved in the case before the supreme court, and the authorities relied upon in the support of the same. When an authority cited is an adjudicated case, the brief or argument must show the names of the parties, the volume in which it is reported, and the page or pages containing the matter to which counsel desire to call the attention of the court. When the reference is a text-book, the number or date of the edition must be stated with the number of the volume and page.

SEC. 100. Transcripts of record prepared for the supreme court shall be made substantially in the manner following, viz:

State of Iowa, }
County of... } }

Pleas before the district (or circuit) court of Iowa, at a term begun and holden in the county of....on the....day of....., A. D. 18..., before the Hon. J. H. G., judge of the....judicial district (or judge of the..... circuit, in the....judicial district) of the state of Iowa.

N. P. }
vs. }
C. D. }

Be it remembered that heretofore, to-wit: on the.....day of....., A. D. 18..., a petition was filed in the office of the clerk of the district (or circuit) court, in and for the county of.....in the words and figures following, to-wit:

(Here insert the petition in full.)

(Proceed in the same manner in relation to whatever paper is filed, such as the original notice, or a petition for attachment, etc.)

If the cause has come from another county by a change of venue, begin as above. "Be it remembered," and state in like manner all that was done in the county from which the venue was changed.)

And afterward there was filed in the office of the said clerk a notice, in the words and figures following, to-wit:

(Here insert the notice in full.)

(Copy all indorsements on the face of the transcript, or copy of record, and not upon the back of the leaf.)

Upon which (or attached to which) was a return as follows:

(Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ or attachment, bond, notice, return, etc.)

And afterward, to-wit: on the.....day of....., A. D. 18..., there was filed in the office of the said clerk, an answer in words and figures following, to-wit:

(Here insert answer in full.)

(Should the clerk doubt what the paper is let him call it a "*paper* in the words and figures following," etc.)

Where a paper is filed in term time, add the day of the term to the day of the month, as in the next form.

A. B. }
vs.
C. D. }

And afterwards, to-wit: on the.....day of....., A. D. 18..., it being the.....day of the.....term of said court, the said A. B. (or plaintiff) filed the following demurrer to the answer of the said C. D. (or of the said defendant), to-wit:

(Here insert demurrer in full.)

(If a party files more than one pleading at the same time, they should be numbered in their legal order, as for instance a demurrer, plea and answer, and the transcript may say.....(stating the date).... the said C. D. (or defendant) filed his demurrer, plea and answer, which are filed *de bene esse*, or subject to the rule.)

A. B. }
vs.
C. D. }

And now, on this.....day of....., A. D. 18..., it being the.....day of the said term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer (copy the entry of the proceedings of the court, sustaining or overruling the demurrer).

And afterward on the.....day of the said....., it being the.....day of the said term, the said plaintiff filed his replication in the words and figures following, to-wit:

(Here set out replication in full.)

(Here set out copy of motion and affidavit.)

In the district (or circuit) court,county.

(Here insert in full the verdict as rendered.)

(Here insert in full the verdict as rendered.)

(Here insert in full the bill of exceptions.)

(Here insert in full the motion for a new trial.)

And now, on this....day of....., A. D. 18..., this cause coming

up for a hearing on the motion of the plaintiff for a new trial, it is considered by the court, that the same be overruled (or, as the case may be).

(Then add the final entries of record, comprising final judgment, etc., and certificate of clerk.)

NOTE.—The foregoing form is only an example, and is to be varied according to the circumstances. The actual facts of the case will dictate *what* is to be done, but in all cases it is to be done substantially in *like manner* with the above, giving the proper order and date of the filing of papers and incorporating them at the proper date into the proceedings of the court.

It will be understood that it is not necessary in all instances to send up the *whole* of the record, but the clerk may be guided by the directions of the appellant under section 3184 of the Code.

SEC. 101. When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone.

SEC. 102. The clerk shall make the following distribution of all printed abstracts, briefs and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the state library, two copies to the law department of the state university, and one shall be filed in his office.

IX.—OF THE ADMISSION OF ATTORNEYS.

SEC. 103. Examinations of applicants for admission to the bar shall be had at each term of the court.

SEC. 104. Each applicant for admission shall, before the first day of the term of court at which he asks to be examined, file with the clerk of this court a written request for examination in his own handwriting and signed by himself, together with the proofs of his qualifications as to age, residence, character and time and place of study, required by section 2 of chapter 168 of the Acts of the Twentieth General Assembly, all prepared and presented in the form prescribed by these rules.

SEC. 105. The court will appoint, on the morning of the day of the examination, a committee of not less than three members of the bar, who shall assist in the examination of applicants for admission.

SEC. 106. The justices of this court will prepare not less than thirty questions to be submitted to each applicant in writing or print, which he shall answer in writing. A proper and convenient room shall be provided for the use of the applicants, wherein they may prepare their answers without interruption. While so engaged they shall have access to no books and have no communication with anyone. The written or printed questions shall be varied at each term.

SEC. 107. Upon consideration of the oral and written examinations and the proofs of qualifications, the court will admit or reject the applicant.

SEC. 108. The proofs of the qualifications of the applicant as to age, character, place of residence and time and place of study, shall be by affidavit made before some officer authorized to administer oaths. When made before an officer not having a seal, other than a judge of the supreme court, district or circuit courts of this state, his official character and signature shall be authenticated by a proper certificate, attested by the seal of the clerk of a court of record.

The proof of the applicant's good moral character, residence in the state and age, shall be by affidavits of at least two witnesses, and the applicant shall also make affidavit of his age and place of residence.

The proof of his term of study shall be by the affidavit of the member of the bar with whom he pursued his studies, and when he has studied at a law school, such fact and his term of study there shall be shown by the affidavit of one or more of the professors or instructors of such school. Such affidavit shall show that the applicant has actually, and in good faith, pursued the study of the law for the time prescribed by the statute, and the fact that the affiant is a practicing lawyer, or is a professor or instructor in the law school at which the applicant studied.

SEC. 109. An attorney admitted to practice in another state, before admission here, shall furnish proofs of good moral character, that he is twenty-one years of age, is a resident of this state, and has practiced law regularly for not less than one year in the state wherein he was admitted, by like affidavits provided for in the preceding rule.

When such affidavits are made before an officer not having a seal, the official character of the officer and his authority to administer oaths, as well as the genuineness of his signature, shall be shown by the certificate of the clerk of a court of record under the seal thereof.

Such attorney admitted in another state shall also file with the other proof required a copy of the record of the court showing his admission to the bar, which shall be duly proved as required by law for the authentication of the records of the courts of sister states when offered in evidence in the courts of this state.

SEC. 110. The graduates of the law department of the state university may be orally examined at Iowa City by a committee of not less than three members of the bar, appointed by the court. They shall also answer written or printed questions prepared by the justices of this court as prescribed by rule number 106, under the same restrictions and conditions as to being kept from communication with others and consultation of books. Upon the report of the committee as prescribed by the statute, and upon a certificate signed by the members thereof to the effect that the examination was fairly conducted, and the answers to the written or printed questions were prepared by the applicant without opportunity for consultation with persons or books, and upon presentation of the diploma of the applicant, together with his answers to the written or printed questions, this court shall determine upon the question of his admission to the bar, and if admitted the court may direct that the oath prescribed by the statute may be administered at Iowa City, and when done the fact shall be reported by the person admin-

istering the oath to the clerk of this court, who shall make proper record thereof.

SEC. 111. The proofs of qualifications as to age, good moral character, residence in the state and time and place of study, being required by the statute in cases of students of the law department of the university, must, in all instances, be presented by them upon application for admission.

SEC. 112. In estimating the time of study, a school year of thirty-six weeks spent in a reputable law school in the United States shall be equivalent to a full year spent in an office, and a fraction of a school year spent in a reputable law school in this state, shall be considered equivalent to the same fraction of full year spent in an office.

X.—OF MISCELLANEOUS MATTERS.

SEC. 113. When the original papers in a cause in which final judgment is not rendered in this court are brought into this court upon an appeal or writ of error, either party desiring to withdraw the same can have leave to do so on filing a receipt for them with the clerk, and causing a copy to be made of those papers which constitute the record under section twenty hereof, and paying the clerk's fees therefor, which costs shall be taxed to the party failing in this court, and such copy shall be filed by the clerk and kept as a record in the cause. In cases where the costs of such withdrawal have not been charged in the first bill of costs, the clerk is authorized to charge them as costs of increase, and to issue execution therefor.

SEC. 114. The clerk shall docket the causes as the same are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district, and shall cause notice of the manner he has set such causes to be published and distributed in such manner as the court may direct. No cause shall be docketed unless the abstract required by the rules of the court is filed fifteen days before the first day of the term at which the cause is set down for trial.

SEC. 115. The clerk, immediately after the time expires during which causes may be docketed for trial at a term of court, shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the day each cause is assigned for trial, and such other matter for information of the court and attorneys as may be conveniently given. He shall forward to each justice of the court, to each attorney having causes at the term, and to the clerk of the district and circuit courts of each county, a copy of said docket.

SEC. 116. The clerk shall, with as little delay as possible, send to each justice of the court a copy of the abstracts, briefs and arguments, and other printed matter filed in each case docketed or set down for trial upon the docket of the term.

APPENDIX.

767

INDEX TO RULES.

A.

Section.

ASSIGNMENT OF ERRORS—

served and filed, when failure to do so, form of..... 51

ARGUMENTS—PRINTED—

served and filed..... 54

form of..... 99

“ ORAL, notice of..... 55

only two counsel to make—shall not exceed one hour... 56

which counsel to open. 57

AFFIRMANCE—

damages on..... 63

cause may be remanded for judgment on..... 64

ATTORNEYS—

admission of.....103-112

ABSTRACTS OF RECORDS—

cause submitted on..... 12

what they shall contain..... 18

served on opposite party—filed and when..... 19

additional by appellee..... 19

how prepared..... 96

form of..... 93

to have index..... 99

distribution of..... 102

to be sent to judges..... 106

APPEALS TO SUPREME COURT—

from what judgments and orders.....4, 5, 6, 11

when taken..... 11

none, when amount in controversy does not exceed \$100, except on

certificate..... 11

perfected by notice..... 12

notice of, on whom served..... 13

from part of judgment..... 14

cross appeals..... 18

dismissed, when appellant has no right to prosecute..... 26

improperly taken or right to prosecute terminated—proceedings

to show..... 27

in criminal cases..... 39

who may appeal in..... 40

when..... 41

how.....42, 43

transcript in..... 44

by state, no supersedeas in..... 45

by defendant, supersedeas by bail..... 46

without bail defendant may not be sent to penitentiary..... 47

discharge on bail..... 48

part or all of defendants may join in appeal..... 49

B.

BRIEFS AND PRINTED ARGUMENTS—

when to be served—failure to serve, consequences of—how to be prepared and printed	53
form of... ..	99
to be sent to judges.....	116

BAIL—

in criminal cases	47, 48
-------------------------	--------

C.

COSTS—

security for.....	94
printing of briefs, etc., taxed as—unnecessary costs taxed against party making them.....	95

CALLING OF CAUSES.....	58
------------------------	----

CIRCUIT COURTS—

appeals from	4
--------------------	---

CRIMINAL CASES—

appeal in.....	39, 49
docketing—failure to file transcript—precedence of.....	74
personal appearance in, not necessary.....	75
not dismissed for informality.....	76
no assignment of, or joinder in error, necessary.....	77
defendant closes argument.....	78
opinions, in writing and filed for record.....	79
court to examine case without regard to technicalities and render such judgment as the law demands—may reduce but not increase punishment.....	80
in appeals by state punishment can not be imposed.....	81
judgment reversed.....	82
“ affirmed.....	83
“ to be recorded and certified, to lower court.....	84
supreme court has no jurisdiction after its judgment is certified to lower court.....	85
copy of certificate, authority to sheriff	86
deduction of term of imprisonment.....	87

CROSS APPEALS.....	18
--------------------	----

D.

DAMAGES ON AFFIRMANCE.....	63
----------------------------	----

DEATH OF PARTIES—

representatives substituted.....	25
----------------------------------	----

DEPOSITIONS—

when and how certified to supreme court.....	20
--	----

DISCHARGE OF CONVICTS—

on bail.....	46, 47, 48
--------------	------------

DISMISSAL OF APPEAL—

when appellant has no right to prosecute	26, 27
--	--------

DISTRICT COURTS—

appeal from..... 4

DOCKET—

how causes are docketed.....114, 17
 not docketed unless abstract filed and rules complied with 18
 how causes docketed in criminal cases.....74, 50
 all causes docketed, to be heard unless continued..... 68
 for term—printed and distributed..... 115

DECISION—

none until written opinion is filed..... 69

DECREES—

how prepared, served and filed..... 71
 at option: when option declared and decree prepared..... 72

DISSENTING OPINIONS—

to be in writing and filed..... 59

E.

EXECUTIONS—

issued from supreme court.....66, 67

G.

GARNISHMENT—

upon execution from supreme court..... 67

J.

JUDGMENTS—

may be entered in vacation..... 10
 reversal or affirmance..... 61
 against sureties..... 62
 what may be rendered by supreme court..... 61

JURISDICTION—

of supreme court.....4, 5, 6, 7, 8, 9, 11

M.

MOTIONS—

notice of, when to be given—argued in writing..... 52

N.

NOTICES—

how served..... 28
 of motions.....52, 53

NOTICE OF APPEAL—

on whom served..... 13
 manner of service and return 28
 time of service..... 15
 service by publication and upon agents..... 16

O.

OPINIONS AND DISSENTING OPINIONS—

reduced to writing..... 59
 reported.... 60
 no decision till opinion is filed.... 69

ORAL ARGUMENTS—

notice of.....	55
only two counsel to make; shall not exceed one hour in length..	56

ORIGINAL PAPER—

view of when and how obtained...	30
----------------------------------	----

P.**PARTIES—**

how designated on appeal, civil case.....	17
a "part" may appeal how.....	22
refusing to join in appeal.....	23
when deemed to join in appeal.....	24
death of parties.....	25
how designated on appeal, criminal cases.....	50

PROCEDENDO—

not to issue in civil cases for thirty days after filing opinion...	70
---	----

Q.**QUORUM—**

three judges constitute.....	2
------------------------------	---

R.**RECORD—**

what constitutes	20
------------------------	----

REHEARING—

petition for—when filed.....	88
written notice for.....	89
argument for—reply.....	90
to be printed	91
opinions to be printed in.....	92
petition for suspends decision.....	23

RESTITUTION, WRIT OF—

when to issue.....	65
--------------------	----

RULES, RELATING TO ABSTRACTS, ETC.—

when waived or suspended.....	101
-------------------------------	-----

S.**SERVICE OF NOTICES—**

how made.....	28
---------------	----

SUBMISSION OF CAUSES—

only on briefs....	53
only when arguments are finally concluded.....	54

SUPERIOR COURTS—

appeals from.....	4
-------------------	---

SUPREME COURT—

number of judges of.....	1
chief justice of.....	1
quorum	2
one judge may adjourn.....	2
officers of.....	3
jurisdiction of.....	4, 5, 6, 7, 8, 9, 11
terms of.....	10

APPENDIX.

771

SUSPENSION OF RULES—	101
----------------------	-----

SUPERSEDEAS—

stay of proceedings only on	81
when issued—bond	92
how discharged, when bond insufficient	33
another to be issued upon sufficient bond	34
bond, penalty of	35
as to part of judgment	36
execution countermanded upon	37
property levied on given up upon	38

T.

TERM DOCKET—

printed and distributed	115
-------------------------	-----

TRANSCRIPT OF RECORD—

what to contain	12
form of	99
failure to file, judgment affirmed, when	21
perfected upon suggestion of diminution of record	29

W.

WRIT OF RESTITUTION—

when to issue	65
---------------	----

WAIVER OF RULES—

as to abstracts, etc	101
----------------------	-----

WITHDRAWING PAPERS—	113
---------------------	-----

INDEX.

ABANDONMENT.

1. OF HOMESTEAD AFTER INVALID CONVEYANCE: CONVEYANCE NOT VALIDATED. See Homestead, 1.

ABSTRACT.

1. OF RECORD ON APPEAL TO SUPREME COURT. See Practice in Supreme Court, *passim*.

ACCOMPLICE.

1. CORROBORATION OF: WHAT IS SUFFICIENT. See Criminal Law, 7.
2. ACTS AND ADMISSIONS OF BINDING ON EACH OTHER. See Criminal Law, 13.

ACKNOWLEDGMENT.

1. PRESUMPTION IN FAVOR OF TRUTHFULNESS OF CERTIFICATE. See Mortgage, 2.

ADJOURNMENT.

1. JUDGE MAY ADJOURN TERM OF COURT BEFORE IT IS BEGUN. See Criminal Law, 16, 19.

ADMINISTRATOR.

1. BY WHOM APPOINTED: EVIDENCE. It is the duty of the clerk to appoint administrators when the circuit court is not in session; but when it is in session that duty devolves upon the court. (Code, § § 2312, 2315.) But, by whomsoever appointed, it is the duty of the clerk to issue the letters of administration; (Code, § 2365;) so that the fact that letters are issued by the clerk in term time is no evidence that the appointment was not made by the court; but letters appearing to have been so issued may properly be admitted to prove the due and lawful appointment of the administrator. *Citizens' Bank v. Rhutzel*, 316.
2. ACTION IN CHANCERY AGAINST TO ENFORCE LIEN: KIND OF PROCEEDINGS: OBJECTION TOO LATE. The enforcement of a lien upon the land of a decedent could not be procured in probate proceedings, and an action therefor was rightly brought in chancery; and, even if the proceedings could and should have been in probate, the administrator, after appearing and defending in the court below, without making objection there to the kind of proceedings, could not make such objection for the first time in this court. *Goodnow v. Wells*, 654.

See ESTATES OF DECEDENTS.

ADOPTION OF CHILD.

See DOMESTIC RELATIONS, 1, 3.

AD QUOD DAMNUM.

See RAILROADS, 10, 11, 12, 14, 15, 16, 21, 22, 23, 24.

ADULTERY.

1. EVIDENCE OF: WHAT IS SUFFICIENT. Adultery is peculiarly a crime of darkness,—seldom capable of being proved by other than circumstantial evidence; and the evidence is held to be sufficient when the circumstances proved lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence. (*Inskip v. Inskip*, 6 Iowa, 204.) Accordingly, the evidence in this case (see opinion) held to establish the defendant's guilt in an action for divorce. *Names v. Names*, 383.

AGENCY AND AGENT.

1. AGENCY TO SELL LAND: DEFECTIVE POWER OF ATTORNEY: RATIFICATION OF SALE AND RECEIPT OF PROCEEDS: SPECIFIC PERFORMANCE. Where A. had a power of attorney from defendant, but it was not sufficiently broad to cover the sale of land, though intended for that purpose, but it appeared from other evidence that A. had parol authority from defendant to sell the land in question as her agent, and he did sell it, and paid the proceeds to defendant, held that she could not avoid a specific performance on the ground that the power of attorney was defective, because she was bound by the parol authority, upon which the action for specific performance was based. *Rook v. Jameson*, 202.
2. DECLARATIONS OF AGENT TO PROVE AGENCY. Where the fact of agency is conceded, the acts and declarations of the agent pertaining to contracts made by him within the scope of his agency are competent evidence, and binding on his principal; but such acts and declarations are not admissible to prove the fact of agency. *Clanton v. Des M., O. & S. R'y Co.*, 350.
3. AGENT OF FIRM: EXCESS OF AUTHORITY. See Promissory Note, 8.

See PROMISSORY NOTE, 1.

PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIBI.

1. INSTRUCTIONS SUSTAINED. See Criminal Law, 24, 26.

ALIMONY.

1. ACTION FOR IN IOWA AFTER DIVORCE IN FOREIGN STATE. See Divorce, 2.
2. TEMPORARY: AMOUNT OF. See Divorce, 3.

AMENDMENT.

See MECHANIC'S LIEN, 5.

PLEADING, 8.

PRACTICE IN SUPREME COURT, 20.

APOTHECARY.

See PHARMACIST.

APPEAL.

(1.) *To Supreme Court.*

1. FROM JUDGMENT ON DEMURRER. Plaintiffs demurred to the answer, and the demurrer was overruled, and, plaintiffs refusing to plead further, the case was dismissed, and judgment for costs rendered against the plaintiffs. *Held* that an appeal would lie from such judgment. Code, § 3164. *Arnold Bros. v. Kreutzer & Wasem*, 214.
2. JURISDICTION OF TRIAL COURT TO CORRECT RECORD. After an appeal to the supreme court, the trial court still has jurisdiction to correct its own record in the case. *Mahaffy v. Mahaffy*, 63 Iowa, 55, followed. *Mazon v. Chicago, M. & St. P. R'y Co.*, 226.
3. TRIAL DE NOVO: CERTIFICATION OF EVIDENCE: TIME. In order to a trial *de novo* in this court, it must affirmatively appear that the evidence was certified by the judge within the time for taking an appeal. Chap. 95, Laws of 1882; *Mitchell v. Laub*, 59 Iowa, 36. Accordingly, where the judge's certificate is not dated, a trial *de novo* cannot be had. *Russell & Co. v. Johnston*, 279.
4. INJUNCTION: RECORD: AFFIDAVITS USED ON HEARING OF APPLICATION. The affidavits used on the hearing of an application for a temporary injunction are no part of the record, and, to entitle the parties to have them considered by this court on appeal, they should be preserved at the time of the hearing, either by bill of exceptions or the certificate of the judge, and filed in the clerk's office; or possibly they might be identified by the certificate of the judge made after the hearing. But the certificate of the clerk and the affidavits of the parties and attorneys are not competent for the purpose of such identification. *Hart v. Foley* 407.
5. TRIAL OF EQUITY CASE UPON ERRORS: STIPULATION AS TO EVIDENCE. The parties to an equity case have the right to have it reviewed in this court upon errors duly assigned, and, having so agreed, they may, to effectuate such purpose, agree upon the evidence introduced and considered by the court below, as provided in § 3170 of the Code. *Hutchinson v. Wells*, 430.
6. LESS THAN \$100: INSUFFICIENT CERTIFICATE. This appeal, involving less than \$100, is dismissed, because the certificate of the trial judge is not sufficient in itself, but makes it necessary to resort to the record to ascertain what the question is on which an opinion is sought. *Bennett v. Parker*, 451.
7. RIGHTS OF PARTIES NOT JOINING IN. Parties to an action not joining in an appeal can present no questions affecting their claims or interests not involved in the questions raised by the appellant. *Buller v. Barkley*, 491.
8. LESS THAN \$100: QUESTIONS NOT CONSIDERED. On the appeal of a case involving less than \$100, this court will not review a *part* of an instruction given on the trial, nor will it pass on a question certified, when it contains assumptions of fact in conflict with the record. It is only questions actually arising in the case which can be considered on such appeals. See opinion for illustrations. *Cunningham v. Chicago, B. & Q. R'y Co.*, 514.

9. **NO BELIEF FOR APPELLEE.** One who does not appeal cannot have a modification in this court of the judgment appealed from. *Huff v. Olmstead*, 598.
10. **FROM ORDER ADMITTING NEW EVIDENCE IN LOWER COURT AFTER REVERSAL.** Where a cause appealed to this court was reversed and remanded to the lower court for a decree in accordance with the opinion of this court, and the defendant was then permitted in the lower court, against plaintiff's objection, to introduce additional evidence, *held* that such ruling was not such a final order as would sustain an appeal to this court, since it could not be said in advance that such evidence would determine the case against plaintiff. *Garmoe v. Sturgeon*, 700.
11. **DEMURRER TO INDICTMENT SUSTAINED IN PART AND CAUSE DISMISSED: NO APPEAL BY DEFENDANT.** See Criminal Law, 10.

See ASSIGNMENT OF ERRORS.

PRACTICE IN SUPREME COURT.

APPEARANCE.

1. **TIME FOR APPEARANCE OF DEFENDANT: POWER OF COURT TO FIX BY RULE.** Under § 180 of the Code, the district and circuit courts have power to make a rule requiring defendants, when so notified, to appear and plead by noon of the first day of the term, notwithstanding § 2599 of the Code, and that, upon failing so to do, default will be entered against them. *McGrew v. Downs*, 687.

ARCHITECT.

1. **SUPERVISION OF BUILDING: NEGLIGENT CONSTRUCTION: DAMAGES.** An architect who is employed to furnish plans for a building, and to superintend its construction, is liable for damages if, through his lack of skill or care, the foundations are so defective as to cause the walls to crack. *Schriener v. Miller*, 91.

ARGUMENT.

1. **OUTSIDE OF RECORD.** See Practice, 3, 5; Practice in Supreme Court, 16.

ARREST.

1. **RESISTANCE TO OFFICER MAKING: FACTS NOT JUSTIFYING.** A person who resists an officer in making an arrest cannot justify his resistance on the ground that the party arrested is not guilty of the charge upon which he is arrested. *Montgomery v. Sutton*, 497.
2. **WITHOUT WARRANT: WHEN LAWFUL: ERRONEOUS INSTRUCTION.** Under § 4200 of the Code, a peace officer may make an arrest without a warrant when a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it; and an instruction given herein, limiting the right to make such arrest to cases where an offense is committed or threatened in the officer's presence at the time of the arrest, or afterwards only in case the offender is likely to escape, *held* erroneous. *Id.*

ASSAULT.

See CRIMINAL LAW, 25.

ASSAULT WITH INTENT TO KILL.

See CRIMINAL LAW, 12.

ASSESSMENT.

See TAXATION.

ASSIGNMENT

1. OF BILL OF LADING: EFFECT OF. See Bill of Lading, 1, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. EXHIBITION OF CLAIM AGAINST ASSIGNEE: WHAT IS NOT: STATUTE OF LIMITATIONS: EQUITABLE RELIEF. A creditor of an insolvent, who does not exhibit his claim within three months from the time of giving the notice of assignment required by § 2119 of the Code, cannot participate in the dividends until after the payment in full of all claims presented within that time and allowed by the court, (Code, § 2126.) And where plaintiffs had sold to the insolvent certain goods, which passed into the assignee's possession, but plaintiffs gave him notice that as to such goods they rescinded the sale, and demanded the goods, and, the demand being refused, they replevied them, but were defeated on the trial, *held* that such demand and suit did not constitute an exhibition of their claim within the meaning of the last named section, and that a claim filed for the same demand eighteen months after the giving of notice of the assignment was not entitled to participate in the first distribution of the assets, and that plaintiffs could not demand equitable relief under § 2421 of the Code—that section having sole relation to claims against estates of decedents. *McKindley, Gilchrist & Co. v. Nourse*, 118.
2. QUESTIONS OF PRIORITY AMONG CREDITORS: JURISDICTION OF STATE AND FEDERAL COURTS. Where an assignment for the benefit of creditors is pending in a state court, and there has been no distribution of assets, an original and independent action in equity may be brought in the same court, (*Wurtz v. Hart*, 13 Iowa, 515,) or in any other state court having equity jurisdiction, or in the federal courts, to determine the equities and priorities of the creditors among themselves, and the decree in such equitable action will be binding upon the court wherein the assignment is pending. *Knoxville Nat. Bank v. Hanirick*, 583.
3. WHAT IS NOT. A chattel mortgage made by partners, which does not include all the firm property, and which is not intended by any of the parties to operate as an assignment for the benefit of creditors, cannot be construed as an assignment. *Carson, Pirie, Scott & Co v. Byres & Eggers*, 606.

See DETINUE, 3.

ASSIGNMENT OF ERRORS.

1. NOT SUFFICIENTLY SPECIFIC. Where each of two defendants separately demurred to the petition, and the demurrers were sustained, and the appellant assigned as error "the ruling of the court in sustaining the several demurrers of the defendants," naming them, *held* that the assignment was not sufficiently specific under § 3207 of the Code. *Bradley v. Johnson*, 614.
2. TIME OF FILING. See Practice in Supreme Court, 15.

ATTACHMENT.

1. **CONVERSION OF PROPERTY UNDER: PLEADING: BURDEN OF PROOF.** In an action against a plaintiff in attachment for the wrongful sale of a horse under an execution in the attachment case, the defendant in answer admitted that the horse was sold on an execution issued in his favor in the attachment proceedings. *Held* that it must be presumed that the judgment and execution followed the ordinary course of the law in such cases, and that the execution was issued by defendant's direction; and that the burden of proof was on defendant to negative these presumptions, if he would escape personal liability for the wrongful sale of the horse in question. *Peterson v. Foli*, 402.
2. **OF REAL ESTATE: PRIOR PAROL AGREEMENT TO SELL: ATTACHMENT TAKES PRECEDENCE.** One of the distributees of an estate was also a debtor thereto, and he agreed in parol with the administrator that the latter should sell his interest in the real estate and apply the proceeds on the debt. But, before any conveyance of the realty was made under the agreement, the real estate was attached as the property of the distributee. *Held* that the administrator had no such lien or interest as would defeat the attachment. *Allison v. Graham*, 68.
3. **OF MORTGAGED CHATTELS: RECOVERY OF PROPERTY BY DEBTOR'S ASSIGNEE.** See *Detinue*, 3.
4. **RESTITUTION BOND: DISCHARGE OF SURETY: JUDGMENT ON BOND.** See *Surety*, 1, 2.
5. **OF VENDEE'S INTEREST: QUESTION OF PRIORITY AS AGAINST VENDOR'S EQUITY.** See *Vendor and Vendee*, 1.

See GARNISHMENT.

ATTORNEY AT LAW.

1. **MISCONDUCT OF IN PRESENCE OF COURT.** See *Contempt*, 1; *IN ADDRESSING JURY.* See *Practice*, 5; *IN ARGUMENT TO SUPREME COURT.* See *Practice in Supreme Court*, 16.

ATTORNEY'S FEES.

1. **EVIDENCE AS BASIS FOR RECOVERY OF: PRACTICE.** Where a note sued on provides for reasonable attorney's fees, to be taxed as part of the costs, it is the better practice, where the trial is to the court, to determine the question and amount of such fees after the decision of the main cause, because, if there should be no recovery on the note, there would be no occasion to inquire into the question of attorney's fees. *Kelso v. Fitzgerald*, 266.

See *PRACTICE IN SUPREME COURT*, 11.

BAILMENT.

1. **DELIVERY OF PROMISSORY NOTE BY CUSTODIAN TO MAKER WITHOUT PAYMENT: WHO LIABLE TO OWNER.** See *Estates of Decedents*, 4.
2. **DEPOSIT STOLEN.** See *Promissory Note*, 1.

BASTARDY.

1. **PROCEEDINGS NOT CRIMINAL IN CHARACTER: COUNTY NOT LIABLE FOR COST.** Proceedings brought under title 25, chap. 56, of the Code, by the mother of a bastard child against the putative father, to charge him

with the support of the child, are not criminal in their nature, though brought in the name of the state, and the county is not liable for the costs in such a case, under the provisions of Code, § 3790. *McAndrew v. Madison Co.*, 54.

BILL OF LADING.

1. PAROL TO VARY TERMS OF: RIGHT OF BANK ADVANCING MONEY ON TO RELY ON WRITTEN AND PRINTED TERMS. A bill of lading is both a receipt and a contract, and in its character as a contract it is no more open to explanation or alteration by parol than any other written contract. And where a bill of lading made by the defendant to W. provided that the goods should be delivered to the "consignee or owner," but the space designed for the name of the consignee was left blank, and it further provided that the property would be delivered only upon the surrender of the bill of lading, and the bill was assigned to the plaintiff to secure advances made to the shipper, and the defendant, pursuant to an oral understanding with the shipper, of which plaintiff had no notice, consigned the goods to S., who received and disposed of them, so that, when plaintiff presented its bill of lading and demanded the goods, delivery thereof was impossible, *held* that plaintiff had a right to rely upon the terms of the bill of lading, and that, in an action to recover of defendant the amount of its loss, evidence of the oral understanding upon which the goods were shipped to S. was not admissible. *Garden Grove Bank v. Humeston & Shenendoah R'y Co.*, 526.
2. CHARACTER OF CONTRACT: EFFECT OF ASSIGNMENT OF. While a bill of lading is not negotiable, it is assignable, and possesses attributes not common to the ordinary non-negotiable instruments enumerated in § 2084 of the Code. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can be altered or changed only upon a surrender of the original, and a collateral oral understanding between the shipper and carrier, by which the property is to be delivered to one not the assignee and holder of the bill, does not follow it into the hands of an assignee without notice, and cannot defeat his rights under the terms of the bill. *Id.*

BILL AND NOTES.

See PROMISSORY NOTE.

BOARD OF EQUALIZATION.

See TAXATION, 1, 2, 5.

BOARD OF SUPERVISORS.

See INTOXICATING LIQUORS, 7, 8.

BOND.

1. RESTITUTION BOND IN ATTACHMENT: DISCHARGE OF SURETIES ON. See Surety, 1, 2.

BOOK ACCOUNT.

1. ACTION ON: COPY AS EVIDENCE. See Evidence, 21.

BOUNDARIES.

See RIPARIAN RIGHTS, 1.

BRIDGE.

1. NEGLIGENCE OF TRAVELER IN CROSSING UNSAFE BRIDGE. See County, 1, 2.

BURDEN OF PROOF.

See ATTACHMENT, 1.

CRIMINAL LAW, 27.

PRINCIPAL AND AGENT, 4.

PROMISSORY NOTE, 7.

CARRIERS.

1. OF GOODS. See Bill of Lading.

2. EXTORTION AND UNJUST DISCRIMINATION BY. See Railroads, 25.

CASES IN THE IOWA REPORTS CITED, FOLLOWED, ETC.

[The figures immediately following the title of the case show the volume and page of the Iowa Reports where the case is found; the words in Roman type indicate the subject under consideration, and the figures following refer to the page in this volume where the citation is made.]

A.

- Adams v. Griffin*, 66, 125. Tax title: Statute of limitations. 604.
American Em. Co. v. Clark, 47, 671. Interpretation of writing; Duty of court. 136.
Amer. Miss. Ass'n v. Smith, 59, 704. Tax sale: Notice to redeem: Proof of service. 605.
Anderson v. Hall, 48, 346. Vacation of invalid judgment: In what court to proceed. 710.
Angell v. Johnson, 51, 625. Exemption from execution: Waiver. 450, 525.
Armstrong v. Tama County, 34, 309. Pauper bills; Authority of township trustees. 131.
Atherton v. Dearmond, 33, 353. Parol to vary writing. 595.
Atkins v. Anderson, 63, 739. Depositions: Use of in other case. 173.
Aufrecht v. Northrup, 20, 61. Purchase of land subject to mortgage. 727.

B.

- Bailey v. Anderson*, 61, 749. Appeal: Instructions not excepted to. 230.
Baldwin v. Dougherty, 39, 50. Estate of decedents: Equitable relief to claimants. 112.
Baldwin v. Tuttle, 23, 66. Kind of proceedings. 657.
Barnett v. Mendenhall, 42, 296. Relinquishment of homestead right. 100.
Bates v. Riddick, 2, 426. Mortgaged land sold in parcels: Chargeable *pro rata*. 301.
Bell v. Bjerson, 11, 233. Contract: Signing without reading. 651.
Bennett v. Hanchett, 49, 71. Vacation of invalid judgment: In what court to proceed. 710.

- Bette v. Glenwood*, 52, 124. Assignment of errors: Time. 290.
Bills v. Belknap, 36, 583. Road supervisors: Injunction. 203.
Blaney v. Hanks, 14, 400. Judgment no lien on naked title. 455.
Boyd v. Ellis, 11, 97. Due process of law. 626.
Brace v. Grady, 36, 352. Power of court to correct record. 178.
Bringolf v. Polk County, 41, 654. Board of prisoner awaiting examination. 243.
Brown v. Painter, 44, 368. Redemption from tax sale: Terms. 26.
Bruner v. Boteman, 66, 488. Homestead: Invalid conveyance: Subsequent abandonment. 101.
Burroughs v. McLain, 37, 189. Estate of decedents: Equitable relief to claimants. 112.

C.

- Cain v. Cain*, 23, 31. Will to defeat dower. 265.
Callanan v. Madison County, 45, 561. Redemption from tax sale: Terms. 26.
Cannon v. Iowa City, 34, 203. Evidence omitted by mistake. 60.
Case v. Dwire, 60, 442. Conveyance in fee with inconsistent limitation. 496.
Chambers v. Cochran, 18, 159. Release of surety by discharge of securities. 47.
Chicago, R. I. & P. R'y Co. v. Grinnell, 51, 476. Railroad land grant; When title matures. 428.
Churchill v. Fulliam, 8, 45. Evidence: Copy of account. 601.
City of Keokuk v. Scroggs, 39, 447. Cities and towns: Powers of. 213.
City of Maquoketa v. Willey, 35, 328. Primary liability of firm property. 610.
Claffin v. Reese, 54, 544. Answer: Denial of knowledge and information. 189.

Clark v. Griffith, 4, 405. Will to defeat dower. 264.
Clark v. Parker, 58, 509. Mechanic's lien on building. 289.
Clark v. Reiniger, 66, 507. Contracting witnesses as to irrelevant matter. 18.
Coffey v. Wilson, 65, 270. Execution sale without notice: Damages and penalty. 296.
Coger v. Northwestern Union Packet Co., 37, 145. Civil rights. 539.
Conger v. Burlington & S. W. R'y Co., 41, 419. Damages for right of way: Action for. 512.
Conrad v. Starr, 50, 481. Mechanic's lien on building. 289.
Cooley v. Brown, 35, 475. Petition and amendment construed together. 508.
Coon v. Jones, 10, 131. Vacating judgment: necessity of denying indebtedness. 315.
Cortell v. Ham, 2, 552. Will to defeat dower. 264.
Cotes v. City of Davenport, 9, 227. Rights as to surface water. 346.
Cowan v. Boone, 48, 360. Appeal from judgment on demurrer. 218.
Cowles v. Buckman, 6, 161. Jury means twelve persons. 297.
Cousins v. Wescott, 15, 225. Parol to vary writing. 181.
Crane v. Ellis, 31, 510. Evidence omitted by mistake. 60.
Cummins v. Des M. & St. L. R'y Co., 63, 387. Railroads: Right of way: Owner of fee. 240.

D.

Daniels v. Chicago, I. & N. R'y Co., 41, 52. Right of way damages. 512.
Daniels v. Chicago & N. W. R'y Co., 35, 129. Right of way damages. 512.
Dawson v. Dawson, 12, 512. Contract: Consideration. 596.
Deford v. Mercer, 24, 118. Estoppel. 474.
Dewey v. Peck, 33, 242. Estoppel by judgment. 49.
Dist. Twp. of Spencer v. Dist. Twp. of Ritterson, 56, 86. Action against district: Demand necessary. 412.
Donaldson v. Mies. & M. R'y Co., 18, 280. Evidence omitted by mistake. 60.
Dougherty v. McManus, 36, 557. Defective notice: Jurisdiction. 547.
Downard v. Groff, 40, 597. Execution sale of land: When owner's rights end. 613.
Doyle v. Reilly, 18, 108. Estoppel by judgment. 49.
Dryden v. Wy lis, 51, 534. Vacating judgment: Necessity of denying indebtedness. 315.
Dubuque & Pac. R'y Co. v. Webster County, 21, 235. Recovery of taxes paid on another's land. 655.
Dunlavy v. Chicago, R. I. & P. R'y Co., 63, 425. Personal injury: Presumption of care from natural instincts. 158.

E.

Evans v. St. Paul Harvester Works, 63, 204. Mortgage of exempt chattels: Mortgagee's rights. 649, 663, 669.

F.

First Nat. Bank v. Bennett, 40, 537. Lien on leasehold. 107 et seq.

Fogg v. Holcomb, 64, 621. Innocent purchaser by quit-claim. 653.
Foley v. Chicago, R. I. & P. R'y Co., 64, 644. Operation of railroad: What is not. 76.
Folsom v. Star Union Freight Line, 54, 498. Estoppel must be specially pleaded. 19.
Freburg v. City of Davenport, 63, 119. Rights as to surface water. 347.

G.

Garrigan v. Knight, 47, 525. Recovery of taxes paid on another's land. 652.
Geipke v. Blake, 19, 263. Parol to vary writing. 595.
German Theo. School v. Dubuque, 64, 736. Photographs as evidence. 145.
Gilman v. Donovan, 53, 362. Vacating judgment: Necessity of denying indebtedness. 315.
Gilman v. Donovan, 59, 76. Change of venue: When not allowed. 223.
Gimble v. Ferguson, 53, 414. Deed of assignment of mortgaged chattels. 663, 669.
Goodnow v. Litchfield, 59, 226. Recovery of taxes paid on another's land. 655.
Goodnow v. Litchfield, 63, 226. Recovery of taxes paid on another's land. 655, 656.
Goodnow v. Moullon, 51, 555. Recovery of taxes paid on another's land. 652, 656.
Goodnow v. Stryker, 61, 261. Recovery of taxes paid on another's land. 655.
Goodnow v. Stryker, 62, 221. Recovery of taxes paid on another's land. 652, 655, 656: Des Moines river lands: When taxable. 659.
Goodnow v. Wells, 67, 693 (ante.) Des Moines river lands: When taxable. 661, 693.
Goodrich v. Deaman, 37, 563. Railroad lands: When taxable. 659.
Grace, ex parte, 12, 208. Examination of execution debtor: Contempt: Constitutionality. 621 et seq.
Grant v. Crow, 47, 632. Road supervisors: Injunction. 206.
Graitan v. Malleson, 51, 622. Vacation of invalid judgment: In what court to proceed. 710.
Grimmell v. Warner, 21, 11. Settlement: Presumption. 597.
Grosvenor v. Henry, 27, 269. Tenancy: Notice to quit. 546.

H.

Hadley v. Gregory, 57, 157. Estate of decedents: Equitable relief to claimants. 112.
Haines v. Burlington, C. R. & N. R'y Co., 64, 315. Exceptions to instructions. 19.
Hale v. First Nat. Bank, 50, 642. Appeal: Presumption in favor of trial court. 501.
Hale v. Gibbs, 43, 390. Depositions: Introduction by adversary. 319.
Harber v. Seaton, 66, 211. Redemption from tax sale: Terms. 26.
Harrison v. McKim, 18, 491. Parol to vary writing. 181.
Hatfield v. Chicago, R. I. & P. R'y Co., 61, 424. Negligence: Question of law or fact. 159.
Hecht v. Dettman, 56, 679. Execution sale of land: When owner's rights end. 613.
Hedge v. Lowe, 47, 137. Contract: Restraint of trade. 219.
Hintrager v. Hennessy, 46, 600. Appeal: No relief for appellee. 493.

Hoard v. City of Des Moines, 62, 326. Rights as to surface water. 346.
Hollingsworth v. Des M. & St. L. R'y Co., 63, 443. Railroads: Right of way: Owner of fee. 240.
Hougan v. Milwaukee & St. P. R'y Co., 35, 553. Subterranean water-courses: Rights of adjoining land-owners. 400.
Houser v. Chicago, R. I. & P. R'y Co., 60, 230. Negligence: Question of law or fact. 189.
Hubbell v. Keam, 31, 299. Evidence omitted by mistake. 60.
Hull v. Alexander, 26, 599. Purchase of land subject to mortgage. 737.
Hurd v. Gallaher, 14, 394. Parol to vary writing. 696.

I.

Ind. Dist. of Crocker v. Ind. Dist. of Ankeny, 43, 206. Assignment of errors: Time. 369.
Inskip v. Inskip, 5, 304. Adultery: Nature of evidence. 386.
Iowa Falls & S. C. R'y Co. v. Cherokee County, 37, 483. Railroad lands: When taxable. 659.
Iowa Falls & S. C. R'y Co. v. Woodbury County, 38, 496. Railroad lands: When taxable. 659.
Iowa Homestead Co. v. Webster County, 21, 221. Recovery of taxes paid on another's land. 636.
Iowa News Co. v. Harris, 62, 501. Certiorari: Who may not invoke. 704.
Isett v. Lucas, 17, 503. Parol to vary writing. 696.

J.

Jackson v. Boyd, 53, 536. Habeas Corpus: Wrong remedy. 555.
Jager v. Evans, 46, 188. Vacating judgment by default: Showing of merits. 689.
Jeffrey v. Keokuk & Des M. R'y Co., 56, 546. Negligence of employe: Evidence of custom. 153 *et seq.*
Johnson v. Johnson, 52, 596. Evidence against administrator. 238.
Johnson v. Monell, 13, 300. Purchase of land subject to mortgage. 737.
Jones v. Clark, 31, 497. Remanding equity case. 629.
Jones & Mages Lumber Co. v. Boggs, 63, 589. Statute of Limitations. 196.

K.

King v. Towlesley, 64, 75. Warrant: Forfeiture by neglect of conditions. 359.
King v. Stewart, 43, 334. Vacating judgment by default: Showing of merits. 689.
Koehler v. Hill, 60, 543. Prohibitory amendment to constitution. 287.
Kostendamer v. Pierce, 37, 645. Petition and amendment construed together. 503.

L.

Lane v. Dist. Twp. of Woodbury, 58, 462. School district: Not liable for torts. 412.
Lawrence Sav. Bank v. Stevens, 46, 429. Estoppel by judgment. 49.
Levi v. Karrick, 15, 444. Jurisdiction of trial court pending appeal. 229.
Lewis v. Day, 53, 575. Purchase of land subject to mortgage. 737.

Litchfield v. Hamilton County, 40, 66. Recovery of taxes paid on another's land. 655; Des Moines river lands: When taxable. 659.
Littleton v. Fritz, 65, 498. Intoxicating liquors: Nuisance: Injunction. 278.
Locke v. Sioux City & P. R'y Co., 46, 100. Photographic views in evidence. 148.
Loeb v. Pierpoint, 58, 469. Partnership: Sale by one partner. 556.
Lockwood v. Kitteringham, 42, 287. Vacation of judgment: Proceedings in what court. 710.
Lombard v. Dows, 66, 243. Mortgage for more than debt: Badge of fraud. 610.
Lyle v. Gray, 47, 153. Recovery by wife for loss of time through tort. 508.
Lyon v. Tevis, 8, 79. Remanding equity case. 629 *et seq.*

M.

Mahaffy v. Mahaffy, 63, 55. Jurisdiction of trial court to correct record pending appeal. 229.
Malone v. Burlington, C. R. & M. R'y Co., 61, 326; 66, 417. Operation of railroad: What is not. 75.
Manning v. Mathews, 66, 675. Railroads: Forfeiture of tax by alienation. 149, 161, 734.
Manny v. French, 23, 250. Answer: Denial of knowledge and information. 189.
Martin v. Knapp, 57, 336. Execution sale of land: When owner's rights end. 613.
Mason v. Messenger, 17, 261. Due process of law. 622.
McCarthy v. Hampton Building Ass'n, 61, 267. Contract: Consideration. 596.
McCord v. High, 24, 336. Road supervisors: Injunction. 208.
McCormick v. Moberg, 43, 561. Contract: Signing without reading. 551.
McCrary v. Deming, 38, 527. Kind of proceedings. 637.
McGregor & M. R. R'y Co. v. Brown, 39, 636. Railroad lands: When taxable. 659 *et seq.*
McName v. Malvin, 56, 362. Kind of proceedings. 637.
McNichols v. Wilson, 42, 385. Evidence omitted by mistake. 60.
Meliter v. Wiley, 34, 214. Will to defeat dower. 265.
Meuchirler v. Hatten, 42, 268. Wife's recovery for loss of time through tort. 506.
Miller v. Corbin, 43, 526. Remanding equity case. 629.
Milne v. Walker, 59, 198. Negligence: Question of law or fact. 159.
Minnesota & T. S. R'y Co. v. Hams, 63, 501. Railroad aid tax: Regularity of proceedings. 731.
Mitchell v. Laub, 59, 36. Appeal: Certification of evidence: Time. 280.
Moffit v. Adams, 60, 44. Exemption from execution: Waiver. 450.
Montgomery v. Shockey, 37, 107. Petition and amendment construed together. 503.
Muldoney v. Ill. Cent. R'y Co., 52, 176. Motion for verdict: Effect of. 59.
Mutholland v. Des M., A. & W. R'y Co., 60, 740. Railways on streets: Assessment of damages. 513.
Munger v. City of Marshalltown, 59, 763. Use of unsafe walk: Negligence. 309.
Muscantine W. R'y Co. v. Horton, 38, 33. Railroad and tax: Performance of conditions. 733.

N.

Nelson v. Chicago, R. I. & P. R'y Co., 38, 564. Contracting witness as to irrelevant matter. 18.

P.

Parkhill v. Town of Brighton, 61, 108. Injury on defective walk: Other safe route. 308.
Parsons v. Nutting, 45, 404. Vacating judgment: Allegations necessary. 315.
Peck v. Parchen, 52, 46. Evidence: Copy of account. 601.
Pelamourges v. Clark, 9, 1. Deposition: Introduction by adversary, 319; Evidence: Grounds for opinion. 570.
Pertins v. Jones, 55, 211. Change of venue: When not allowed. 928.
Perry v. Murray, 55, 416. Assignment: Priorities: Jurisdiction. 588.
Phillips v. Van Schick, 37, 236. Estoppel must be specially pleaded. 19.
Pitt's Sons' Manuf'g Co. v. Spitznogle, 54, 36. Sale: Conditional warranty: Rescission of contract. 362.
Platt v. Harrison, 8, 79. Habeas Corpus: Improper remedy. 553.
Powers v. O'Brien County, 54, 501. Assignment of errors in equity case. 608.

Q.

Quinton v. Burton, 61, 471. Road supervisors: Injunction. 208.

R.

Ransom v. Stanberry, 22, 336. Estoppel must be specially pleaded. 19.
Rausch v. Moore, 48, 611. Verification of pleadings. 172.
Renwick v. Davenport & N. W. R'y, 47, 511. Railroad aid tax: Constitutionality of statute. 729.
Rice v. City of Des Moines, 40, 638. Walking on unsafe walk: Negligence. 309.
Richards v. Burden, 81, 303. Appeal from ruling on evidence. 701.
Richards v. Wapello County, 48, 507. Assessment of real estate. 200.
Ross v. City of Clinton, 46, 636. Rights as to surface water. 347.
Ross v. City of Davenport, 66, 548. Walking on unsafe walk: Negligence. 309.
Ryan v. Varga, 37, 78. Railroad aid tax: Regularity of proceedings: Collateral attack. 731; Town voting with township. 736.

S.

Saxon v. Peck, 43, 250. Redemption from tax sale: Terms. 26.
Sharpless v. Gregg, 45, 649. Estates of decedents: Payment of mortgage out of general assets. 375.
Shaw v. Brown, 28, 37. Depositions: Use of in other case. 173.
Shaw v. Quintin, 30, 58. Defective notice: Jurisdiction. 547.
Sherraden v. Parker, 24, 26. Release of surety by discharge of securities. 47.
Singer Sewing Machine Co. v. Holcomb, 40, 23. Interpretation of contract. 595.
Sisters of Visitation v. Glass, 46, 154. Kind of proceedings. 622.

Sloan v. Cent. Iowa R'y Co., 62, 728. Negligence: Question of law or fact. 159.
Sloesen v. Burlington C. R. & N. R'y Co., 60, 215. Negligence: Question of law or fact. 159.
Smith v. Marland, 59, 645. Promissory notes: Negotiability. 574.
Smith v. Shea, 62, 119. Redemption from foreclosure sale. 434.
Smith v. Wolf, 55, 556. Appeal: No relief for appellee. 493.
Smith v. Foram, 37, 89. *Certiorari*: Who may not invoke. 704.
Snell v. Leonard, 65, 553. Railroad aid tax: Constitutionality of statute. 729.
Sperry v. Etheridge, 63, 543. Taking cause from jury. 321.
State v. Bates, 23, 96. Resisting officer: Justification. 493.
State v. Bruce, 48, 530. *Alibi*: Burden of proof. 478.
State v. Dein, 44, 648. Indictment: Duplicitly. 232.
State v. Delong, 12, 453. Grand Jurors: Term of service. 232.
State v. Greene, 64, 11. Criminal law: Tried without plea. 28.
State v. Hamilton, 57, 596. *Alibi*: Burden of proof. 478.
State v. Hemrick, 62, 414. *Alibi*: Burden of proof. 478.
State v. Hopkins, 65, 240. Larceny: Possession of stolen goods. 567.
State v. Maxwell, 47, 454. Indictment: Forgery: Name of party injured. 145.
State v. (aborn), 45, 423. Instructions without evidence. 157.
State v. Reed, 62, 40. *Alibi*: Burden of proof. 478.
State v. Richart, 57, 245; Larceny: Possession of stolen goods. 567.
State v. Roney, 37, 30. *Certiorari*: When not allowed. 176.
State v. Start, 7, 501. Contempt: Due process of law. 627.
State v. Stickley, 41, 232. Evidence: Grounds for opinion. 570.
State v. Stuart, 61, 208. Indictment: Forgery: Name of party injured. 145.
Stevens v. Williams, 46, 540. Foreign notary: Sufficiency of seal. 603.
Stewart v. Board of Supervisors, 30, 9. Due process of law. 626; Railroad aid tax: Constitutionality of statute. 729.
Stewart v. Brand, 23 477. Voluntary conveyance: Specific performance. 381.
Stinson v. Richardson, 44, 373. Relinquishment of homestead right. 100.
Stone v. Chicago & N. W. R'y Co., 47, 82. Motion for verdict: Effect of. 69.
Stryker v. Polk County, 22, 131. Recovery of taxes paid on another's land. 655; Des Moines river lands: When taxable. 659.
Sully v. Kuhl, 30, 275. New trial: Newly discovered evidence. 183.
Sweet v. Brown, 61, 669. Remanding equity case. 629.

T.

Taggart v. Wood, 20, 236. Vacating judgment: Necessity of denying indebtedness. 315.
Tascar v. Marshall, 4, 544. Remanding equity case. 629.
Templin v. Rothweiler, 58, 269. Instructions without evidence. 157.
Thode v. Spofford, 65, 294. Redemption from tax sale: Terms. 26.

Tiedt v. Carstensen, 61, 334. *Certiorari*: Finding of fact not reviewed on. 703.
Tuttle v. Chicago, R. I. & P. R'y Co., 42, 513. Wife's recovery for loss of time through tort. 508.

V.

Van Guilder v. Justice, 54, 630. Will to defeat dower. 265.
Vimont v. Chicago & N. W. R'y Co., 64, 513. Removal to federal courts. 694.
Votaw v. Corwin, 62, 39. Appeal: Less than \$100: Certificate. 452.

W.

Wallon v. Wray, 54, 531. Building on leased land: Personalty. 108.
Ware v. Thompson, 39, 65. Remanding equity case. 620.
Watrous v. Winn, 37, 72. Will to defeat dower. 265.
Way v. Ill. Cent. R'y Co., 33, 555. Motion for verdict: Effect of. 59; Personal injury: Presumption of care from natural instincts. 157.
Welch v. Board of Supervisors, 23, 190. *Certiorari*: Who may not invoke. 704.

Walmors v. Mellinger, 64, 741. Recovery for malicious prosecution of civil action. 109.

Wheeler v. Smith, 13, 564. Deposition: Introduction by adversary. 319.
Williams v. Williams, 61, 612. Garnishment: Notice: Jurisdiction. 85.
Wood v. Chicago, R. I. & P. R'y Co., 60, 456. River declared not navigable: Effect on boundaries of adjacent lands. 198.
Woodward v. Horst, 10, 120. New trial as to part of cause. 717.
Wright v. Connor, 34, 240. Demurrer to one count of answer. 330.
Wurts v. Hart, 13, 515. Assignment: Priorities: Jurisdiction. 586.

Y.

Yerger v. Bars, 54, 77. Notice to agent: How far principal bound by. 102.
Yoe v. Nichols, 51, 330. Verification of pleadings. 172.
York v. Wallace, 43, 305. Instructions without evidence. 157.

Z.

Zelle v. McHenry, 51, 572. Habeas corpus: When improper remedy. 555.

CEMETERIES.

See TOWNSHIP TRUSTEES, 1.

CERTIORARI.

1. TO REVIEW ACTION OF SUPERVISORS IN GRANTING PERMIT TO SELL LIQUORS: WHO MAY PROSECUTE: WHAT QUESTIONS CONSIDERED. See *Intoxicating Liquors*, 7, 8.
2. TO CORRECT ERROR IN UNWARRANTED CHANGE IN COURT RECORD. See *Practice*, 6.

CHALLENGE.

See JURORS AND JURY, 5.

CHANGE OF VENUE.

1. ON MOTION TO CORRECT RECORD: CHANGE NOT ALLOWED. After the cause was tried in the circuit court and an appeal taken, a motion was made in that court by appellee to correct the record, which was alleged to have been falsified. Pending this motion, appellant moved for a change of the place of trial, on the ground of the prejudice of the circuit judge. *Held* that the motion for a change was properly overruled, because the cause was not pending in the circuit court for trial, but only for a correction of the record, and there is no provision of the statute authorizing a change of the place of trial in such a case. *Maxon v. Chicago, M. & St. P. R'y Co.*, 226.
2. OBJECTION TOO LATE ON APPEAL. See *Practice in Supreme Court*, 33.
 See *PRACTICE IN SUPREME COURT*, 36.

CHARACTER.

1. AS TEST OF CREDIBILITY OF WITNESS: EVIDENCE IN RELATION TO. See *Criminal Law*, 3, 4.

CHATTEL MORTGAGE.

1. **SALE OF PROPERTY UNDER: COLLUSION AND FRAUD: ACCEPTANCE OF PROCEEDS BY OWNER: ESTOPPEL.** Plaintiff sought to set aside the sale of a horse under a chattel mortgage, upon the ground of collusion between the mortgagee and the purchaser; but, it appearing that plaintiff had accepted the surplus of the proceeds of the sale, *held* that he was estopped from asserting that the sale was invalid. *France v. Haynes*, 141.
2. **SUFFICIENCY OF DESCRIPTION: QUESTION FOR JURY.** The question whether the horse involved in this case could be identified by the description contained in the mortgage under which he was claimed was one of fact to be determined by the jury, and the instructions of the court, (see opinion,) holding that certain inaccuracies in the description were immaterial, were erroneous, because invading the province of the jury. *Peterson v. Foli*, 402.
3. **CLAIM THAT MORTGAGED PROPERTY WAS SEIZED UNDER, AND WRONGFULLY CONVERTED: ESTOPPEL BY PLEA IN FORMER ACTION.** Where plaintiff, in a prior action against the defendant, pleaded that the proceeding under which defendant claimed to have acquired the property in question was a foreclosure of a chattel mortgage upon the property, and under such plea he (plaintiff) received all the rights and advantages which could have accrued to him if the proceeding had in all respects been regular, he cannot now be permitted, while retaining those advantages, to assert that defendant was a mere trespasser in that proceeding, or that he (plaintiff) was not divested of the property by the sale. The principle of *Deford v. Mercer*, 24 Iowa, 118, followed. *Rump v. Schwartz*, 471.
4. **PROPERTY IN HANDS OF PLEDGEE: SEIZURE UNDER MORTGAGE: OBJECTION BY PLEDGEE: WAIVER.** The chattels in question were in the hands of plaintiff, an unsatisfied pledgee of the mortgagor, at the time the chattel mortgage was made and when the property was seized thereunder. When the property was so seized, plaintiff objected, and claimed to be its owner, but did not claim a lien upon it. *Held* that by failing to assert his lien he did not waive his right to recover for the conversion of the property. *Angell v. Johnson*, 51 Iowa, 625, distinguished. *Gunsel v. McDonnell*, 521.
5. **RIGHT TO SEIZE AND SELL PROPERTY BEFORE MATURITY OF DEBT: TERMS CONSTRUED.** The chattel mortgage in question contained the following provision: "Whenever the holder hereof may deem himself insecure, then he may take said property (the mortgaged property) by virtue of this mortgage, and sell the same at public auction, * and the proceeds of said sale to be applied on said note" (the note secured by the mortgage); but preceding this provision was the following: "If this note and mortgage shall be paid on or before the maturity thereof, then this mortgage to be void." *Held* that, construing both provisions together, the mortgagee might *seize* the property whenever he felt himself insecure, but that he could not *sell* it till after the maturity of the debt. *Bank of Carroll v. Taylor*, 572.
6. **VALIDITY OF.** See Assignment for Benefit of Creditors, 3.
7. **RIGHT OF MORTGAGOR'S ASSIGNEE TO POSSESSION OF CHATTELS AS AGAINST ATTACHING CREDITORS.** See Detinue, 3.
8. **IDENTIFICATION OF MORTGAGED PROPERTY.** See Evidence, 14.
9. **SALE UNDER MORTGAGE NOT ENJOINED AT SUIT OF OTHER MORTGAGEE.** See Injunction, 3.

10. **VALIDITY: EVIDENCE.** See Practice, 7.

See PROMISSORY NOTE, 3.

CIRCUIT COURT.

1. **DUTY OF AS TO APPOINTMENT OF ADMINISTRATORS.** See Administrator, 1.

See COURTS.

CIRCUMSTANTIAL EVIDENCE.

See CRIMINAL LAW, 20.

CITIES AND TOWNS.

1. **DEDICATION OF STREET: UNACKNOWLEDGED PLAT: SALE OF LOTS: ANIMUS DEDICANDI.** Where the proprietors of an addition to the defendant city made and had recorded a plat of the addition, but the same was not acknowledged as required by law, and they sold and conveyed lots bounded according to the descriptions in the plat, *held* that proof of these facts was sufficient to establish the intention of the proprietors to dedicate to public use the streets shown by the plat, notwithstanding it was not acknowledged. *Shea v. City of Ottumwa*, 39.
2. **LOSS OF STREET BY NON-USER: FACTS NOT AMOUNTING TO.** Where land in a city was dedicated to public use for a street, but it was rough and hilly, and was needed and used by the public but little for thirty years, when the city proceeded to grade it, *held* that the delay in improving it did not cause it to revert to the dedicator. *Id.*
8. **INJURY ON SIDEWALK: HOW LONG OUT OF REPAIR: INSTRUCTION.** In an action to recover for an injury on a sidewalk, it was proper to direct the jury that they should determine from all the evidence, including a photograph of the walk, the length of time the defect had existed. *Barker v. Town of Perry*, 146.
4. **MODE OF EXERCISING POWERS GRANTED TO: STATUTE MUST BE FOLLOWED: ESTABLISHING FIRE LIMITS.** Where a power granted to a municipal corporation is directed to be exercised through certain means or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner. Accordingly, a city cannot prohibit the erection of wooden buildings within certain limits except on petition of the owners of two-thirds of the grounds included in any square or block, as provided by Code, § 457. (Compare *City of Keokuk v. Scroggs*, 39 Iowa, 447.) *City of Des Moines v. Gilchrist*, 210.
5. **FIRE LIMITS: PROHIBITION OF LUMBER YARDS WITHIN.** There is no statute authorizing a city to prohibit the establishment and maintenance of lumber yards within the established fire limits. *Id.*
6. **GRADING STREETS: PROVIDING WAY OF ESCAPE FOR OVERFLOWING WATER.** Water overflowing its channels is practically surface water, and a city in grading its streets is not obliged to provide adequate and permanent means of escape for such water, so as to keep it from flowing, on account of the grade, upon land not raised to grade. Compare *Frebuq v. City of Davenport*, 63 Iowa, 119. An instruction herein to the contrary disapproved. *Morris v. City of Council Bluffs*, 343.

7. **CHANGE OF GRADE OF STREET: DAMAGES TO LOT-OWNER.** Before a lot-owner can recover of a city for damages to improvements on his lot by reason of a change in the grade of a street, he must show, not only that the improvements were made according to the actual grade of the street at the time, but that that grade was the one then established by the city. *Id.*
8. **ACTION AGAINST FOR TORT: PRESENTATION OF CLAIM TO COUNCIL AS CONDITION PRECEDENT.** There is no rule of common law nor provision of statute making it necessary, as a condition precedent to a right of action against a city or town upon a claim arising by reason of a tort, that the claim should be first presented to the city or town council. *District Twp. of Spencer v. District Twp. of Riverton*, 56 Iowa, 85, distinguished, as relating only to claims arising upon contract. *Green v. Town of Spencer*, 410.
9. **PAVED STREET TORN UP IN CONSTRUCTING SEWER: COST OF REPAIRING.** Where a street has been paved at the expense of the owners of abutting property, (Code, § 466,) and the pavement has been torn up in the construction of a sewer, it cannot be repaved at the expense of the abutting property owners, but restoring the pavement must be accounted as part of the work of constructing the sewer, and the expense thereof must be paid out of the general fund of the city. (Code, § 465.) *City of Burlington v. Palmer*, 681.
10. **ACTION TO COLLECT SPECIAL TAX: NO COUNTER-CLAIM ALLOWED.** The defendant in an action brought by a city to collect a special tax cannot set up a counter-claim against the city; for the effect of a recovery on such counter-claim would be to divert the tax from its special purpose, which the law will not permit. *Id.*

CIVIL RIGHTS.

1. **EXCLUSION OF COLORED MAN FROM SKATING-RINK: DAMAGES.** Plaintiff, a colored man, sought to recover damages on account of his exclusion from a skating-rink kept and operated by defendants. But, as it does not appear that it was operated under a license or privilege granted by the state, or by the city in which it was conducted, or that it was in any manner regulated or governed by the police regulations of the city, *held* that it must be presumed to have been conducted as a private business merely, and that no person, black or white, had a right to enter against the will of the proprietors. The case of inn-keepers, carriers of passengers and keepers of licensed places of amusement, distinguished. [But see chap. 105, Laws of 1884, since enacted.] *Bowlin v. Lyon*, 536.

CLERK OF COURTS.

1. **DUTY AS TO APPOINTMENT OF ADMINISTRATORS.** See Administrator, 1.

CODE.

See STATUTES CITED, CONSTRUED, ETC.

CONDITION PRECEDENT TO ACTION.

See CITIES AND TOWNS, 8.

INSURANCE, 1.

CONSIDERATION.

1. **GIFT OF SERVICES: SUBSEQUENT AGREEMENT TO PAY: NO CONSIDERATION.** Where one person renders services for another gratuitously, and with no expectation of being paid therefore, no obligation is incurred by the recipient which will support a subsequent promise to pay for the same. *Allen v. Bryson*, 591.
2. **PRESUMED FROM WRITING.** A written contract (a mortgage in this case) imports a consideration and casts the burden upon him who denies it. *Commercial Exchange Bank v. McLeod*, 718.
3. ———: **PRESUMPTION NOT CONCLUSIVE.** A written contract is presumed to be founded upon a consideration, but the presumption may be rebutted by evidence. *Byers v. Harris*, 685.
4. **SETTLEMENT OF CONTROVERSY.** An agreement made in settlement of an existing controversy is founded upon a good and valid consideration. *Goodenow v. Parkinson*, 95; *Commercial Exchange Bank v. McLeod*, 718.
5. **FOR AGREEMENT NOT TO ENGAGE IN BUSINESS.** See Contract, 5.
6. **FOR CONVEYANCE OF EASEMENT.** See Conveyance, 1.
7. **FOR TRANSFER OF SECURITIES TO CHILDREN.** See Estates of Decedents, 3.

See PROMISSORY NOTE, 5.

CONSTABLE

1. **LIABILITY FOR SUSTENANCE OF PRISONERS HELD FOR EXAMINATION.** See Contract, 7.

CONSTITUTION.

1. **CONSTITUTION OF IOWA: AMENDMENT PROHIBITING MANUFACTURE AND SALE OF INTOXICATING LIQUORS NOT LAWFULLY ADOPTED.** *Koshler v. Hill*, 60 Iowa, 543, followed. *McMillen v. Blattner*, 287.

See STATUTES CITED, CONSTRUED, ETC., AT END.

CONSTITUTIONAL LAW.

1. **PROCEEDINGS AUXILIARY TO EXECUTION: IMPRISONMENT FOR CONTEMPT.** Chapter 9 of title 18 of the Code, providing proceedings auxiliary to execution, for the purpose of discovering the property of the execution defendant, is not repugnant to § § 9 and 10 of article 1 of the constitution, in that it provides (§ 3145) that "if any person, party or witness disobey an order of the court or judge or referee, duly served, such party or witness may be punished as for contempt." Such imprisonment does not deprive the prisoner of his liberty without "due process of law," as those terms were understood at the time of the adoption of the constitution. *Ex parte Grace*, 12 Iowa, 203, distinguished. *Eikenberry v. Edwards*, 619; *Farmer v. Hoffman*, 678.
2. **WHAT IS CONSTITUTIONAL JURY: CODE, § 2793.** See Jurors and Jury, 1, 2.
3. **LEGISLATION: APPROVAL OF GOVERNOR: WHEN NECESSARY.** See Legislation, 1.
4. **CONSTITUTIONAL QUESTIONS ARE CONSIDERED WITH RELUCTANCE.** See Practice in Supreme Court, 4, 5.

5. TAXATION IN AID OF RAILROADS. See Railroads, 26.

See CONSTITUTION.

CONSTRUCTION.

1. OF CONTRACT. See Contract, 8, 9, 11.
2. OF STATUTE: CHAP. 149, LAWS OF 1876: POWER TO LEVY POOR TAX. See County, 3.
3. OF STATUTES OF STATE: DECISIONS OF STATE AND FEDERAL COURTS: WHICH PREVAILS IN CASE OF CONFLICT. See Courts, 1.
4. OF DEED: LIFE ESTATE. See Insurance, 8.
5. ON FARM LEASE; WHEN RENT DUE. See Landlord and Tenant, 2.
6. OF TWO MORTGAGES AS PARTS OF SAME TRANSACTION. See Mortgage, 3.
7. OF INTEREST CLAUSE IN NOTE. See Promissory Note, 4.
8. OF NOTE: LANGUAGE OF COLLATERAL MORTGAGE CONSIDERED. See Promissory Note, 6.
9. OF STATUTES: RULE STATED. See Statutes, 1.
10. OF WILLS. See Will, 1, 2.

CONTEMPT.

1. BY ATTORNEY IN PRESENCE OF COURT: FACTS CONSTITUTING. Where a contention arose between counsel as to whether a witness had not already answered a certain question, and the court, after hearing the reporter's notes read, decided that she had answered it, whereupon one of the attorneys sprang to his feet, and, turning to the court, said, in loud tones and insulting manner: "She has not answered the question," *held* that the attorney was guilty of contempt, regardless of the question whether the decision of the court was right or wrong. Code, § 3491. *Russell v. French*, 102.
2. RIGHT OF OFFENDER TO MAKE VERIFIED EXPLANATION. One charged with contempt, even when committed in the presence of the court, has the right to file a written explanation of his conduct under oath, for the purpose of excusing the contempt or reducing the punishment, (Code, § 3496,) and a reasonable opportunity must be given for that purpose before punishment is inflicted. For a failure to give such opportunity in this case, the judgment of the court imposing a fine upon plaintiff for a contempt is reversed. *Id.*
3. PROCEEDINGS AUXILIARY TO EXECUTION: REFUSAL TO TURN OVER NOTES. In a proceeding auxiliary to execution, the defendant was ordered by the judge to turn over certain notes to be sold in satisfaction of the execution, and, though the notes were not in defendant's hands, but in the hands of a resident of a distant state, they were under his control, and *held* that he was guilty of contempt for disobedience to the order. *Eikenberry v. Edwards*, 619.
4. IMPRISONMENT IN PROCEEDINGS AUXILIARY TO EXECUTION: CONSTITUTIONALITY. See Constitutional Law, 1.
5. OF ORDER TO PAY ASSETS TO ADMINISTRATOR: FACTS CONSTITUTING. See Estates of Decedents, 1.

CONTRACT.

1. **FOR WORK: SUBSTITUTE OF EMPLOYEES BOUND BY.** Where M. contracted to paint a house for a certain sum, and commenced the work, but abandoned it to P., who finished it, P. was bound by the terms of the original contract. *Pease v. Thompson*, 70.
2. **SETTLEMENT OF CONTROVERSY AS CONSIDERATION.** An agreement made in settlement of an existing controversy as to the amount which one party should pay the other is founded upon a good and valid consideration. *Goodenow v. Parkinson*, 95.
3. **COMMISSION FOR SALE OF LAND: DUTY OF OWNER TO MAKE CLEAR TITLE.** Defendant employed plaintiff to negotiate a sale of real estate, —plaintiff to have for his services all realized over \$25,000. He sold the real estate for \$26,000, but a portion of it was incumbered by a lease which it took \$300 to remove. *Held* that, in the absence of a special agreement in relation thereto, it was defendant's duty, at his own cost, to convey the property free of incumbrance, and that he could not insist that the \$300 should be deducted from the plaintiff's \$1,000; and that the fact that the deeds were made containing this clause: "It is understood and intended merely to sell and convey the ground only, exclusive of improvements; and subject to the rights of the owners of the improvements therein,"—did not show an intention or understanding that plaintiff should discharge the said lease out of his share of the proceeds. *Wishart v. Dietz*, 121.
4. **AGREEMENT NOT TO ENGAGE IN BUSINESS: ACTION FOR BREACH OF: INSUFFICIENT ANSWER.** An answer in an action for the breach of an agreement not to engage in a certain business at a certain place, during a time named, considered, (see opinion,) and *held* to present no defense to the action, and that a demurrer thereto should have been sustained. *Arnold Bros. v. Kreutzer & Wasem*, 214.
5. ———: **CONSIDERATION FOR.** The purchase by plaintiffs of a stock of goods from defendants was a good consideration for an agreement on the part of defendants, made in the same transaction, that they would not engage in the sale of like goods at the same place during a certain specified time. *Id.*
6. ———: **VALIDITY: PUBLIC POLICY.** A contract not to engage in a certain business, at a certain place, within a specified time, is not void as being against public policy. (See *Hedge v. Lowe*, 47 Iowa, 137.) *Id.*
7. **FOR BOARD OF PRISONERS HELD BY CONSTABLE: PARTIES BOUND BY.** Defendant, as constable, had certain prisoners in his custody for preliminary examination before a magistrate, and he procured board and lodging for them of plaintiff upon the statement, made by defendant at the time, that he would not be responsible to plaintiff for the board and lodging, but that he (plaintiff) must look to the county for compensation. *Held* that, whether or not in any case the county would be liable for board and lodging furnished to prisoners so held the defendant was not liable under the circumstances named. *White v. Jones*, 241.
8. **IN SEVERAL PARTS: ALL PARTS CONSTRUED TOGETHER.** Where a mortgage was but the execution of part of a contemporaneous written agreement, the mortgage and agreement must be construed together to arrive at the true intention of the parties. *Chicago, I. & D. R'y Co. v. Cedar Rapids, I. F. & N. W. R'y Co.*, 324.
9. **SALE OF PHYSICIAN'S GOOD WILL: BREACH: EVIDENCE.** Plaintiff, a physician, as a part of the consideration which induced defendant to purchase certain property, agreed to relinquish to him his practice of

medicine and surgery in P. and surrounding country for three years, reserving only the right to practice in special cases, emergencies and consultations. *Held* that the evidence did not show a breach of such agreement,—the practice of which defendant complains being fairly covered by the reservation. *Powers v. Strout*, 341.

10. NEGLIGENCE IN SIGNING WITHOUT READING: ESTOPPEL. Where plaintiff had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but he chose to rely upon what another said about it, he is estopped by his own negligence from claiming that it is not legal and binding upon him, according to its terms. See opinion for cases followed. *Wallace v. Chicago, St. P., M. & O. R'y Co.*, 547.
11. FOR COMMISSIONS OF SEWING-MACHINE AGENT: ABRIGATION BY SUPPLEMENTARY CONTRACT: CONSTRUCTION: SEE OPINION FOR FACTS. *Tuck v. Singer Manfg Co.*, 576.
12. BILL OF LADING: CHARACTER OF: NEGOTIABILITY. See Bill of Lading, 1, 2.
13. FOR DELIVERY OF PROPERTY: CONVERSION INTO MONEY DEMAND. See Landlord and Tenant, 1.
14. CONTRACT TAINTED WITH FRAUD AND AGAINST PUBLIC POLICY. See School Directors, 1, 2.

See CONSIDERATION.

CONTRIBUTORY NEGLIGENCE.

1. CROSSING UNSAFE BRIDGE WHEN THERE WAS ANOTHER SAFE ROUTE. See County, 1, 2.
2. OF EMPLOYEES INJURED ON RAILROADS. See Railroads, 2, 4, 5, 7, 8.

CONVERSION.

1. OF ATTACHED PROPERTY. See Attachment, 1.
2. OF PROPERTY SEIZED UNDER CHATTEL MORTGAGE. See Chattel Mortgage, 3, 4.

CONVEYANCE.

1. GIFT OF REAL ESTATE: ORAL RESERVATION OF EASEMENT: CONVEYANCE WITHOUT RESERVATION: SUBSEQUENT RECONVEYANCE OF EASEMENT: CONSIDERATION FOR RECONVEYANCE: EVIDENCE. A father gave to his children certain real estate, orally reserving an easement, but he conveyed it by deed of warranty without reserving the easement. Some years afterwards the children conveyed back the easement. *Held* that the conveyance and the reconveyance were together the written expression of the original agreement, and that the reconveyance was no less binding because made at a later date, and that, to show the consideration for it, parol testimony of the original agreement was competent. *Clapp v. Forster*, 49.

See HOMESTEAD, 1.

CORPORATIONS.

1. SUCCESSION: EVIDENCE. See Railroads, 15.

See MUNICIPAL CORPORATIONS.

INDEX.

COSTS.

1. COUNTY NOT LIABLE FOR IN BASTARDY PROCEEDINGS. See Bastardy, 1.
2. OF UNNECESSARY ABSTRACT IN SUPREME COURT. See Practice in Supreme Court, 5, 10,

COUNTER-CLAIM.

1. NOT ALLOWED IN ACTION TO COLLECT SPECIAL TAX. See Cities and Towns, 10.

See PRINCIPAL AND AGENT, 4.

PRINCIPAL AND SURETY, 1.

COUNTY.

1. BRIDGE OUT OF REPAIR: INJURY TO TRAVELER: EVIDENCE OF OTHER SAFE ROUTE. In an action for an injury sustained in crossing an unsafe county bridge, it was error to exclude evidence offered by the county to show that there was another equally convenient and perfectly safe route by which plaintiff might have reached his destination. *Parkhill v. Town of Brighton*, 61 Iowa, 103, followed. *Walker v. Decatur Co.*, 307.
2. ———: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. In such case it was error to instruct the jury that if there was another road which was safe and convenient, and the plaintiff knew that the bridge in question was unsafe, then plaintiff was, as a matter of law, guilty of contributory negligence in going over the bridge. The question of contributory negligence under the circumstances was for the jury to determine. See authorities cited in opinion. *Id.*
3. POWER TO LEVY POOR TAX: CHAP. 149, LAWS OF 1876, AMENDING CODE, § 1381: CONSTRUCTION. The effect of Chap. 149, Laws of 1876, amending § 1381 of the Code, is to empower counties having a population of 33,000 inhabitants or more to levy a poor tax of one and a half mills on the dollar, in case the ordinary revenue of the county proves insufficient for the support of the poor, but it does not take away the power, given by the section before amendment to counties containing a less number of inhabitants, to levy a tax of one mill on the dollar for the same purpose. *Lucas County v. Chicago, B. & Q. R'y Co.*, 541.
4. NOT LIABLE FOR COSTS IN BASTARDY PROCEEDINGS. See Bastardy, 1.
5. LIABILITY FOR SUSTENANCE OF PRISONERS HELD BY CONSTABLE FOR EXAMINATION. See Contract, 7.
6. JUDGMENT AGAINST ON DITCH WARRANT, WHEN NO SUCH FUND. See Ditches, 1.
7. RIGHT TO FINES IMPOSED ON CHANGE OF VENUE. See Fines, 1.
8. LIABILITY TO OTHER COUNTY FOR SUSTENANCE OF POOR PERSONS. See Paupers, 1.

COURTS.

1. STATE AND FEDERAL COURTS: INTERPRETATION OF STATUTES OF STATE: CONFLICT OF DECISIONS: WHICH PREVAILS: ILLUSTRATION. It is a rule nowhere disputed that the decisions of the supreme court of a state, interpreting a statute of such state, must be followed by the federal courts: and where the supreme court of the United States, upon a mistaken view of the purport and effect of the decisions of the supreme

court of the state in such a case, renders a decision in conflict therewith, such decision is not binding on the state courts. For this reason, the opinion of the supreme court of the United States in *Litchfield v. Webster County*, 101 U. S., 773, which construes § 711 of the Revision of 1860, and holds that under it lands are not taxable until the next year after a patent could be demanded for them, being based upon a misunderstanding of decisions of this court in cases cited in the opinion, and in conflict with those decisions, is not to be followed by this court. *Goodnow v. Wells*, 654.

2. POWER OF DISTRICT AND CIRCUIT COURTS TO FIX BY RULE TIME FOR APPEARANCE OF DEFENDANTS. See Appearance, 1.
3. STATE AND FEDERAL: CONCURRENT JURISDICTION OF TO DETERMINE QUESTIONS OF PRIORITY BETWEEN CREDITORS OF INSOLVENTS. See Assignment for Benefit of Creditors, 2.
4. POWER OF JUDGE TO ADJOURN BEFORE BEGINNING OF TERM. See Criminal Law, 16, 19.
5. PROLONGATION OF TERM INTO TIME FOR COURT IN OTHER COUNTY. See Criminal Law, 16, 19.
6. DUTY TO INTERPRET WRITTEN CONTRACT. See Evidence, 1.
7. AUTHORITY TO CHANGE RECORD. See Appeal, 2; Practice, 6.

See SUPREME COURT.

CIRCUIT COURT.

CRIMINAL EVIDENCE.

See EVIDENCE, 33.

CRIMINAL LAW.

1. PROCEDURE: TRIAL WITHOUT PLEA: NO PREJUDICE—NO REVERSAL. Where defendant was given time to plead to the indictment, but he neglected to do so, and through inadvertence the cause went to trial without any plea, but was tried in all respects as if a plea of not guilty had been entered, *held* that defendant was not prejudiced by the irregularity, and that a judgment of conviction upon a verdict of guilty should not be set aside on that ground. *State v. Greene*, 66 Iowa, 11, followed. *State v. Hayes*, 27.
2. DISCHARGE OF GRAND JURY AS ILLEGALLY DRAWN: INDICTMENT BY SECOND GRAND JURY: MOTION TO QUASH BECAUSE FIRST JURY WAS ILLEGALLY DISCHARGED. A defendant held to answer to a criminal charge had challenged the grand jury on the ground that it was illegally drawn, and the challenge was sustained and the jury discharged, and another jury was summoned and impaneled as prescribed by Code, § 244. The defendant in this case was indicted by the second grand jury, and he moved to quash the indictment on the ground that the first jury was illegally discharged and, consequently, that the second one was illegally drawn. *Held* that the order discharging the first jury could not thus be collaterally attacked. *State v. Hart*, 142.
3. EVIDENCE OF MORAL CHARACTER OF WITNESS: WHO COMPETENT TO TESTIFY TO. A witness who showed that he had known defendant for many years—ever since he was a small boy—was competent to testify to his moral character as a test of his credibility as a witness. Code, § 3649. *Id.*

4. — : LIMIT AS TO TIME: INSTRUCTION: ERROR WITHOUT PREJUDICE. If an instruction directing the jury that the character and reputation of a witness in the community where he resides, or *has resided*, may be considered for the purpose of testing his credibility, is erroneous, in that it does not limit the evidence to places where the witness has resided *recently*, yet, since all the witnesses testifying to defendant's bad moral character in this case testified that they had known him for a great many years, and up to the time of the trial, and lived in the county of his residence, *held* that the error in the instruction, if any, was without prejudice to defendant, and no ground for reversal. *Id.*
5. FORGERY: INDICTMENT: NAME OF PERSON DEFRAUDED. An indictment for forgery need not allege the name of the person to whom the forged instrument was uttered. Code, § 4313. *State v. Stuart*, 61 Iowa, 203, followed. *Id.*
6. UTTERING FORGED NOTE: EVIDENCE OF THE POSSESSION OF OTHER LIKE NOTE. On the trial of an indictment for uttering a forged note, after the state had introduced evidence tending to show that the note was forged, it was allowed, against defendant's objection, for the purpose of showing that defendant knew that it was forged, to introduce the evidence of a witness who testified that defendant had, about the time the alleged crime was committed, another forged note purporting to be signed by the same persons, which he had seen, and that the signatures to it were, in his opinion, in the same handwriting as those to the note referred to in the indictment. *Held* that it was error to admit such testimony without the production of the note referred to by the witness. *State v. Breckenridge*, 204.
7. EVIDENCE: CORROBORATION OF ACCOMPLICE: WHAT IS SUFFICIENT: QUESTION FOR JURY. A conviction cannot be had on the testimony of an accomplice, unless it is corroborated by other testimony tending to connect the defendant with the commission of the offense. Code, § 4559. But where there is such testimony, its sufficiency is for the jury to determine. Upon consideration of the corroborating evidence in this case, *held* that the jury was warranted in bringing in a verdict of guilty of murder. *State v. Dietz*, 220.
8. GRAND JURY: WHEN TERM OF SERVICE EXPIRES. Grand jurors are selected for the first term of the district court in the year at which jurors are required, commencing next after the first day of January in each year, and they serve for one year, or until the corresponding term of the succeeding year. Code, §§ 234, 239. Consequently, when a term of the district court began on the eighth day of December, 1884, and continued into January, 1885, the grand jury impaneled in 1884 was competent to find an indictment during the term in January, 1885. *State v. Delong*, 12 Iowa, 453, decided under a different statute, distinguished. *State v. Winebrenner*, 230.
9. INTOXICATING LIQUORS: NUISANCE: INDICTMENT: DUPLICITY. An indictment for nuisance in keeping a place for the unlawful sale of intoxicating liquors considered, (see opinion,) and *held* not bad for duplicity. *State v. Dean*, 44 Iowa, 648, followed. *Id.*
10. DEMURRER TO INDICTMENT PARTIALLY SUSTAINED AND CAUSE DISMISSED: NO APPEAL BY DEFENDANT. There was a demurrer to the indictment based upon two grounds. The court overruled the demurrer on one of the grounds, but sustained it on the other ground, and ordered that the indictment and all the proceedings under it be dismissed. *Held* that defendant was in no further peril, and could not maintain an appeal from the judgment of the court in overruling the demurrer on the one ground. *State v. Hoffman*, 231.

11. **SENTENCE ON SECOND CONVICTION AFTER APPEAL: CODE, § 4545.** The district court is not bound to inflict the same punishment on a second conviction as on the first one, after the first one has been reversed on appeal; and, in the absence of a contrary showing, it will be presumed that, in pronouncing the second sentence, the court took into consideration the imprisonment of the defendant under the first sentence, pending the appeal, as required by § 4545 of the Code. *State v. Hopkins*, 285.
12. **ASSAULT WITH INTENT TO KILL: DEADLY WEAPON.** An instrument may or may not be a deadly weapon, depending on the manner of its use. In this case, where an assault was made with premeditation, and with a total disregard of consequences, with a stick three feet long, three inches wide and one inch thick, under the circumstances disclosed by the evidence, (see opinion,) *held* that the jury was warranted in finding the defendant guilty of an assault with intent to murder. *State v. Brown*, 289.
13. **EVIDENCE: ACTS AND ADMISSIONS OF CONFEDERATES.** Where defendant was indicted with others for the commission of a crime, but he was tried separately, and the crime was clearly established, evidence which tended to show that defendant and those connected with him were familiar associates and confederates for the commission of crime, and which tended to connect defendant with this crime, was admissible. *State v. Stevens*, 557.
14. —: **ATTEMPT TO ESCAPE.** An attempt to escape from custody as well as an actual escape, may be shown as tending to establish guilt. *Id.*
15. **FAILURE OF DEFENDENT TO TESTIFY: DUTY TO INSTRUCT AS TO EFFECT OF.** In the absence of a request from the defendant, it was not reversible error for the court to neglect to instruct the jury that the fact that defendant did not testify in his own behalf was not to be considered to his prejudice. *Id.*
16. **PROLONGATION OF TRIAL: ADJOURNMENT OF COURT IN OTHER COUNTY.** The statute does not fix a day for the ending of a term of court, but it does authorize the judge, for a sufficient cause, to adjourn a term before it is begun. (Code, § 159.) So, where the approaching term in another county was adjourned, and the trial of this cause was prolonged into the time when court would otherwise have been in session in the other county, *held* no error. (See *State v. Peterson*, *post*, p. 564.) *Id.*
17. **LARCENY: PRESUMPTION FROM POSSESSION OF STOLEN GOODS: EVIDENCE TO OVERCOME.** The instruction complained of in this case (see opinion) sufficiently stated the rule announced in *State v. Richart*, 57 Iowa, 245, and *State v. Hopkins*, 65 *Id.*, 240, that the presumption of guilt arising from the possession of recently-stolen goods is overcome when the evidence is such as to raise a reasonable doubt whether the defendant did not honestly come into possession of the goods. *State v. Peterson*, 564.
18. **ERROR MUST BE SHOWN IN RECORD.** A complaint made in argument, that the district attorney was guilty of prejudicial misconduct, cannot be reviewed when the record does not show what the misconduct was. *Id.*
19. **PROLONGATION OF TRIAL: TIME FOR COURT IN OTHER COUNTY OF DISTRICT.** Where a pending criminal trial cannot be finished before the time set for court in another county in the district, the judge may adjourn for a time the court in the other county for the purpose of concluding the trial. (Compare *State v. Stevens*, *ante*, p. 557.) *Id.*

20. **CIRCUMSTANTIAL EVIDENCE: WHAT FACTS MAY BE PROVED BY.** When the state undertakes to establish the guilt of one accused of crime by circumstantial evidence, it is entitled to prove not only such circumstances as tend directly to show his guilt, but any competent evidence, though circumstantial, which tends to prove any material fact in the case, is admissible. For example see opinion. *State v. Reno*, 587.
21. **LARCENY: PUNISHMENT NOT EXCESSIVE.** A sentence of five years in the penitentiary held not, under the circumstances of the case, (see opinion,) excessive for the larceny of two pairs of harness, a robe and one pair of fly-nets. *Id.*
22. **PRACTICE: NEGLECT TO READ INDICTMENT AND MAKE OPENING STATEMENT TO JURY: IRREGULARITY WAIVED.** The district attorney in this case introduced his evidence and rested, without reading the indictment or making an opening statement to the jury. On this account the defendant then filed a motion for his acquittal and discharge; but the court overruled the motion and allowed the indictment to be read, and offered to allow defendant to make a statement of his defense, which he declined to do. Held that the defendant waived the irregularity by failing to object to the introduction of the state's evidence at the time, and that no reversal could be had on account thereof. *State v. Norton*, 641.
23. **LARCENY: POSSESSION OF STOLEN PROPERTY: EVIDENCE.** Evidence tending to show that defendant had the stolen horses in his possession examined, but not set out in the opinion, and held sufficient to warrant the verdict of guilty. *State v. Butler*, 643.
24. —: **ALIBI: INSTRUCTION.** The court instructed the jury that "if he (defendant) has shown that at the time of the larceny he was at such a distance from the scene of the larceny as that he could not have participated in the commission of the crime, this will overcome or rebut any presumption of guilt which would arise from the fact of his having possession of the property, if he had it in his possession at the time alleged." Held that the instruction was not vulnerable to the objection that it made the defense of *alibi* depend on the distance of the defendant from the scene of the crime, rather than upon his absence from it. *Id.*
25. **EVIDENCE: ASSAULT: ILL FEELINGS ON PART OF DEFENDANTS.** In cases of assault it is always competent to show previous ill feeling, bad blood, or threats, as tending to show a probable motive for the commission of the crime. And where the assault was made upon a son, and the defendants were indicted jointly therefor, evidence of threats made by one of them against the father and his family was properly admitted. *State v. Fry*, 475.
26. —: **TIME OF OFFENSE: INSTRUCTION.** Where time was not essential in an indictment, it was not error to instruct the jury that they must find that the crime was committed at about the time charged, or at any time within three years prior to the finding of the indictment,—that being the time prescribed by the statute of limitations for the crime in question. *Id.*
27. **ALIBI: BURDEN OF PROOF: INSTRUCTION.** An instruction to the effect that defendants had the burden of proof to establish an *alibi*, but that they need not establish it beyond a reasonable doubt, but that if, upon the whole case, the testimony raised a reasonable doubt as to the defendants' presence at the time and place where the assault was committed, that, of course, would create a reasonable doubt as to their guilt, and would entitle them to an acquittal, held as favorable to defendants as they could demand. See cases cited in opinion. *Id.*

- 28. **REASONABLE DOUBT: INSTRUCTIONS.** Where the ordinary and oft-approved instructions concerning reasonable doubt have been given to the jury, it is not necessary, though requested by defendants, to advise each juror that he is to act on his own convictions, and not concur in a verdict which is against his judgment. *Id.*
- 29. **RESISTANCE TO OFFICER: FACTS NOT JUSTIFYING.** See Arrest, 1.
- 30. **ARREST WITHOUT WARRANT: WHEN LAWFUL.** See Arrest, 2.
- 31. **BASTARDY PROCEEDINGS ARE NOT CRIMINAL IN CHARACTER.** See Bastardy, 1.
- 32. **FINES IMPOSED ON CHANGE OF VENUE: WHAT COUNTY ENTITLED TO.** See Fines, 1.
- 33. **APPEAL: ILLEGIBLE WRITTEN ABSTRACT.** See Practice in Supreme Court, 26.

CROSS-EXAMINATION.

See EVIDENCE, 6, 15.

DAMAGES.

- 1. **MEASURE OF: PROSPECTIVE PROFITS.** See Telegraph Companies, 1.
See MALICIOUS PROSECUTION, 1.
- REPLEVIN, 1.

DECLARATIONS.

- 1. **OF AGENT TO PROVE AGENCY.** See Agency and Agent, 1.
- 2. **OF ACCOMPLICE.** See Criminal Law, 13.

DECREE.

See JUDGMENT AND DECREE.

DEDICATION.

- 1. **OF STREET TO CITY.** See Cities and Towns, 1.

DEED.

- 1. **WITHOUT CONSIDERATION: DEFECT IN NOT CORRECTED IN EQUITY.** See Voluntary Conveyance, 1.
- 2. **GRANTEE BY QUIT-CLAIM TAKES SUBJECT TO EQUITIES.** See Innocent Purchaser, 2.

DEFAULT.

- 1. **JUDGMENT UPON: ON WHAT TERMS SET ASIDE: SHOWING OF MERITS.** See Judgment and Decree, 7.

DEMAND.

- 1. **AS CONDITION PRECEDENT—**
 - (1) **TO ACTION AGAINST CITY FOR TORT.** See Cities and Towns, 8.
 - (2) **TO RECOVERY OF MONEY JUDGMENT FOR FAILURE TO DELIVER PROPERTY.** See Landlord and Tenant, 1.

DEMURRER.

1. **APPEAL FROM JUDGMENT ON.** See Appeal, 1.

DEPOSITION.

1. **USE OF IN OTHER CAUSE BETWEEN SAME PARTIES: WHAT NECESSARY TO SUCH USE.** Depositions which have been regularly taken in one cause may be used on the trial of another cause between the same parties or their privies; but in such case the parties have the same right to except to them, or move for their suppression, as though they had been taken in that cause; and in order that they may have an opportunity to avail themselves of this right, it is necessary that the depositions be filed in the cause, or leave to use them obtained, before the trial is begun. See Code, § 3751. *Shaul v. Brown*, 28 Iowa, 37, decided under a different statute, distinguished. *Searle v. Richardson*, 170.
2. **READING PART OF DEPOSITION TAKEN, BUT NOT USED, BY ADVERSARY.** See Evidence, 13.

DESCRIPTION.

1. **OF CHATTELS IN MORTGAGE: SUFFICIENCY OF.** See Chattel mortgage, 2.
2. **IN VOLUNTARY CONVEYANCE: EQUITY WILL NOT CORRECT MISTAKE IN.** See Voluntary Conveyance, 1.

DES MOINES RIVER LANDS.

See PUBLIC LANDS, 1.

DETINUE.

1. **PRACTICE: NECESSITY OF PROVING THE VALUE OF EACH ARTICLE.** In an action for the recovery of specific personal property, where the defendant retains the property, it is not necessary, in order to recover a judgment for the value of the property, that plaintiff show the value of each article. It is enough for such purpose to show the total value of the property wrongfully detained. *Goldsmith v. Willson*, 662.
2. ———: **FAILURE TO PROVE VENUE OF PROPERTY.** An action to recover specific personal property, brought in the county where the defendant resides, will not be defeated simply because of failure of the plaintiff to prove that the property is detained in that county, for, if it be conceded that, under § 3225 of the Code, the place of suit is determined by the location of the property, and not by the residence of the defendant, still the action may be prosecuted to judgment in the county of defendant's residence, unless he makes application for its removal to the proper county, under § 2589 of the Code. *Id.*
3. **RECOVERY OF MORTGAGED CHATTELS BY ASSIGNEE OF MORTGAGOR FROM ATTACHING CREDITORS.** The fact that specific personal property, sought to be recovered from attaching creditors by an assignee of the debtor, is under mortgage by the debtor,—the mortgage antedating both the assignment and the attachments—will not necessarily defeat a recovery, because, (1) in the absence of a showing to the contrary, the mortgage may provide for a right of possession by the mortgagor, (Code, § 1927,) which right the assignment would pass to the assignee; and (2) even if that is not the case, the mortgagor (and his assignee under him) is entitled as against all the world, except the mortgagee, to the possession of the property; *Evans v. St. Paul Harvester Works*, 63 Iowa, 204; and the right of possession is the essence of the action. *Id.*

See REPLEVIN.

DISTRICT ATTORNEY.

1. MISCONDUCT OF. See Criminal Law, 18.

DISTRICT COURT.

See COURTS.

DITCHES.

1. COUNTY WARRANTS ON DITCH FUND: JUDGMENT AGAINST COUNTY WHEN NO SUCH FUND. Where a ditch has been constructed by the county under chap. 2, title 10, of the Code, and warrants have been drawn on the ditch fund, and payment thereof is refused, when presented to the county treasurer, because the supervisors have not raised a fund by the levy of a tax, as contemplated by § 1214 of the Code, the holder of the warrant is entitled to a judgment against the county for the amount thereof, and to the enforcement of payment by the levy of a tax in obedience to the provisions of the statute. It is not necessary to the recovery of such judgment that a request be made upon the supervisors to raise a fund by the levy of the proper tax, and that such request be denied. *Mills County National Bank v. Mills County*, 697.

DIVORCE.

1. IN SISTER STATE: VALIDITY OF IN IOWA. Where the laws of a sister state relating to the subject of divorce are substantially like those of this state, a decree of divorce regularly obtained in such state will be regarded as valid in this state. *Van Orsdal v. Van Orsdal*, 35.
2. ———: SUBSEQUENT ACTION FOR ALIMONY IN IOWA. Where a husband has procured a valid divorce from his wife in a sister state, if it be admitted that the wife, always a resident of this state, might subsequently maintain an action for alimony out of property found in this state, the rule could apply only to property which the husband owned at the time of the divorce, and not to what he subsequently acquired. *Id.*
3. TEMPORARY ALIMONY: AMOUNT ALLOWED NOT EXCESSIVE. See opinion. *Maben v. Maben*, 284.
4. DESERTION: EVIDENCE INSUFFICIENT. Action for a divorce on the ground of desertion. The circuit court granted the divorce, but upon a review of the evidence, (see opinion,) held that it was not sufficient to establish a willful desertion for the two years next preceding the action, and the decree is reversed and the petition dismissed. *Atkinson v. Atkinson*, 364.
5. DESERTION: EVIDENCE. Upon consideration of the evidence in this case, held that a divorce should have been granted on the ground of desertion. *Lane v. Lane*, 76.

DOMESTIC RELATIONS.

1. ADOPTION OF CHILD UNDER GUARDIANSHIP. Where a guardian of the person and property of a minor child has been duly appointed, such child cannot be adopted by a third party without the guardian's consent;—whether it could be done with such consent. *quarre*. *Burger v. Frukcs*, 460.

2. **PARENT AND CHILD: POWER OF PARENT TO MAKE ORAL GIFT OF CHILD TO ANOTHER.** The law does not confer upon a parent the power to make a mere oral gift of his minor child to another; and the donee in such a case cannot recover the child from its duly appointed guardian. *Id.*
3. ———: **ADOPTION: INHERITANCE.** Whether parents by adoption inherit from their adopted child the same as natural parents from a natural child, is a question not decided in this case. *Id.*

See HUSBAND AND WIFE.

DOWER.

1. **HOW AFFECTED BY DECREE AGAINST HUSBAND ALONE.** Wherever the wife's interest in real estate has once attached, and the question is as to whether it has been divested or otherwise affected, a party asking affirmative relief on the theory that it has, should make her a party to the action brought to determine such question; but where a judgment or decree against the husband alone shows that he never had any interest in which his wife was dowable, she is bound by such decree, though not a party to the action. It is accordingly *held* that these actions for the admeasurement of dower were barred by a former adjudication against plaintiff's husband, in which it was determined that his only interest in the land was that of a mortgagee, though he held the legal title to it. *Lea v. Woods*, 304.

2. **PROVISION IN LIEU OF.** See Will, 1.

EASEMENT.

See RAILROADS.

EMINENT DOMAIN.

See RAILROADS, *passim*.

EQUALIZATION OF TAXES.

See TAXATION, 1, 2, 5.

EQUITY.

1. **PROCEEDINGS TO ENFORCE LIEN MUST BE EQUITABLE.** See Administrator, 2.
2. **JURISDICTION OF TO DETERMINE QUESTIONS OF PRIORITY BETWEEN CREDITORS OF INSOLVENTS.** See Assignment for Benefit of Creditors, 2.
3. **JURISDICTION: EQUITABLE ISSUES RAISED BY CROSS-PETITION IN LAW ACTION.** See Jury Trial, 1.
4. **REFORMATION OF CONVEYANCE WITHOUT CONSIDERATION.** See Voluntary Conveyance, 1.

ERROR.

1. **ASSIGNMENT OF.** See Assignment of Error.
2. **ERROR WITHOUT PREJUDICE: NO GROUND FOR REVERSAL.** See Criminal Law, 1, 4; Evidence, 18; Instructions, 10.

ESCAPE.

1. **ATTEMPT TO ESCAPE AS EVIDENCE OF GUILT.** See Criminal Law, 14.

ESTATES OF DECEDENTS.

1. CONTEMPT OF ORDER TO PAY ASSETS TO ADMINISTRATOR: FACTS INSUFFICIENT TO PURGE: CODE, §§ 2379, 2380. Plaintiff was ordered by the defendant, as judge of the circuit court, under §§ 2379 and 2380 of the Code, to pay the administrator certain moneys which had come into his hands belonging to the estate. Plaintiff refused to pay the money, on the ground that he had received it as a mere clerk of a prior administrator, and had paid it out (without authority it would seem) to the widow for the support of her family, and in discharge of claims against the estate, and that he had in his possession no money, either of his own or belonging to the estate. *Held* that this showing did not purge him of the contempt in disobeying the order, and that he was lawfully committed to jail until he should comply therewith. *Wise v. Chaney*, 73.
2. ALLOWANCE TO WIDOW AND CLAIM AGAINST ESTATE: PRIORITY. An allowance made by the court to the widow of the decedent, under Code, § 2375, unless modified by the provisions of Code, § 2377, must be paid in preference to a claim of a creditor of the decedent, filed and allowed as a claim against the estate; and the administrator has no power to contract with a creditor that his claim shall have preference; nor has the court power, upon the allowance of such claim, to order that it shall be paid first. *In re Estate of Dennis*, 110.
3. TRANSFER OF SECURITIES TO CHILDREN BEFORE DEATH: CONSIDERATION: EVIDENCE: BURDEN OF PROOF: TESTIMONY INCOMPETENT AGAINST ADMINISTRATRIX. The children of the decedent were found, after his death, to have certain notes and mortgages which the widow and administratrix claimed as assets of the estate, but the children claimed that the decedent, before his death, had transferred the securities to them in consideration of an undertaking entered into by each of them to pay to the decedent semi-annually a certain sum during his life. *Held* that the burden of proof was upon the children to establish the making and delivery of the undertakings; and that the children themselves were incompetent to testify, as against the administratrix, to an agreement with the decedent concerning their delivery, and that the husband of one of the children, who was alleged to have joined with his wife in executing one of the undertakings, was also incompetent to testify to such agreement, under § 3539 of the Code. *Samson v. Samson*, 253.
4. NOTE BELONGING TO ESTATE WRONGFULLY DELIVERED BY CUSTODIAN TO MAKER: WHO LIABLE FOR. If, as claimed, one of the defendants held an unpaid note belonging to the estate of decedent, and he wrongfully delivered it to the maker without payment, then the administratrix should have brought her action against the maker of the note to recover the amount thereof, and judgment therefor against the defendant who so delivered the note was erroneous. *Id.*
5. BEQUEST OF REAL ESTATE IN TRUST: SUBSEQUENT MORTGAGE OF REAL ESTATE: PAYMENT OUT OF GENERAL ASSETS. Where a testator, after the execution of his will, in which he bequeathed certain real estate to his executors in trust for each of his children, mortgages a portion of such real estate, the mortgagee may insist upon the sale of the mortgaged premises to pay the debt, but a legatee of mortgaged property may insist, as against the executor and his co-legatees, upon the payment of the debt out of the general assets of the estate. *Toner v. Collins*, 369.
6. FAILURE TO PROVE CLAIM: STATUTE OF LIMITATIONS: EQUITABLE CONSIDERATIONS. Plaintiff held a note secured by chattel mortgage, against the estate. He filed his claim in time, but neglected to prove it

within the twelve months provided by § 24:1 of the Code. *Held* that the claim was barred, notwithstanding plaintiff had permitted the mortgaged property to be sold in the belief that there was "plenty of property to pay the debts," and notwithstanding the administrator had agreed to see him paid. The discharge of the property was immaterial, and the promise of the administrator, whether made before or after the claim was barred, was incompetent to bind the estate. *Colby v. King*, 458.

7. WHO TO APPOINT ADMINISTRATOR. See Administrator, 1.
8. ENFORCEMENT OF LIEN AGAINST REAL ESTATE: ACTION IN EQUITY. See Administrator, 2.

ESTOPPEL.

1. IN PARS: DEFINITION: FACTS NOT CONSTITUTING. In order to constitute an estoppel *in pars*, the party pleading it must have been induced by the representations relied upon to so change his relations that he will suffer prejudice if the party who made them is permitted to assert the contrary. In view of this definition, *held* that an instruction to the effect that if defendant believed that his signature to the note in question was a forgery, but concealed that fact from the plaintiffs, and gave them to understand that it was genuine, and requested them to bring suit upon it against the makers, including himself, and they acted on this request, employed counsel and instituted the suit, he would be estopped from denying the genuineness of the signature, could not be sustained. *Eikenberry v. Edwards*, 14.
2. FRAUD BETWEEN HUSBAND AND WIFE IN OBTAINING CREDIT: INCOMPETENT EVIDENCE. A husband's name was Martin O., and his wife's name was Maggie O., and they both did business under the name of M. O. An attachment against Martin was levied on a stock of goods claimed by Maggie, and she brought her action to recover the goods from the sheriff. Afterwards she assigned to plaintiff, who was substituted as a party to the action. The issue presented by the answer was that, because of the manner in which Maggie permitted the business to be done, she was estopped from claiming the goods, although they in fact belonged to her; or, if such was not the issue, then that the manner in which the business was conducted constituted such a fraud as entitled the creditors of Martin to seize the goods and subject them to the payment of his debts. *Held* that under the issues, as thus stated, evidence of property statements signed by the husband, and furnished to creditors from whom he purchased goods, were not only irrelevant, but that, in the absence of evidence tending to show that the wife had any knowledge of the statements, or that the creditors supposed that they were made by her, or that they were selling goods to her, she could in no manner be bound thereby. *Barbee v. Hamilton*, 417.
3. TO DENY VALIDITY OF SALE BY ACCEPTANCE OF PROCEEDS. See Chattel Mortgage, 1.
4. BY PLEA IN FORMER ACTION. See Chattel Mortgage, 3.
5. OF PARTY SIGNING CONTRACT WITHOUT READING. See Contract, 10.
6. OF EXECUTION DEBTOR TO CLAIM PROPERTY AS EXEMPT. See Execution, 2.
7. MUST BE SPECIALLY PLEADED. See Practice, 3.

See FORMER ADJUDICATION.

INJUNCTION, 5.

PRINCIPAL AND AGENT, 1.

RAILROADS, 16.

EVIDENCE.

1. **PAROL TO VARY WRITING: DUTY OF COURT TO INTERPRET WRITING**
This action was founded upon a written contract (set out in the opinion) which shows an unconditional sale of a new piano to plaintiff, and the like sale of an old one by her to defendant, and an unequivocal agreement on her part to pay a certain sum of money in addition. *Held* that it was error to admit parol testimony to show that the sales were upon conditions not expressed in the written contract; and that it was the duty of the court to interpret the contract as written, and error to submit it to the jury for interpretation in the light of such oral testimony. *Daly v. W. W. Kimball Co.*, 132.
2. **OF VALUE: WITNESS MUST BE SHOWN TO BE COMPETENT.** A witness should not be allowed to state what in his judgment a certain article (a piano in this case) is worth, without first showing that he is acquainted with the value of such property in the market. *Id.*
3. **PERSONAL INJURY: EXHIBITION OF WOUNDS TO JURY.** The practice of permitting persons who sue for personal injuries to exhibit to the jury their wounds or injured limbs has been too long sanctioned in this state to be now called in question. *Barker v. Town of Perry*, 146.
4. **PHOTOGRAPHIC VIEWS: MAGNIFYING GLASSES: TAKING VIEWS TO JURY ROOM.** Wherever it is proper that the *locus in quo*, or any object, be described to the jury, it is competent to introduce a photographic view of the same, and to allow the jury to examine it with a magnifying glass. And there is no impropriety in allowing the jury to take such photograph with them to their room. See cases cited in opinion. *Id.*
5. **CONDITION OF SIDEWALK AFTER ACCIDENT THEREON.** In an action for an injury on a defective sidewalk, it was competent to show that, subsequent to the accident, when a photographic view of the walk, introduced in evidence, was taken, the walk was in the same condition as when the accident occurred. *Id.*
6. **IMPROPER CROSS-EXAMINATION.** Questions asked upon cross-examination, not for the purpose of testing the truth of any of the witness' statements in chief, nor with a view of eliciting further information upon subjects on which he was examined in chief, are improper, and should be excluded when objection is made thereto. *Whitsett v. Chicago, R. I. & P. Ry Co.*, 150.
7. **PLEADINGS AND JUDGMENT IN FORMER TRIAL: IDENTITY OF PARTIES: ORDER OF INTRODUCTION.** The order in which evidence should be introduced is a matter within the discretion of the trial court, and that discretion was not abused in this case by allowing the introduction of the pleadings and judgment in another case, without first establishing the identity of the parties and rights involved. *Searle v. Richardson*, 170.
8. **PAROL TO EXPLAIN OR VARY WRITING: RULE STATED AND APPLIED.** Where parties have entered into a written contract, but the words do not express their whole contract, but are nevertheless of such character that the law, by implication, superadds something, the implication may be rebutted or controlled by parol evidence. But when nothing is left to implication there is no room for parol evidence. And so, where a

judgment, which was a lien on land, was assigned in writing to a purchaser of a portion of the land, and it was necessary to the protection of such person that the judgment should be kept alive, *held* that it was incompetent to show by parol that the real understanding of the parties was that there was nothing to assign, but that the transaction was the payment and not a purchase of the judgment, and that the contract of assignment was a void act. *Evans v. Burns*, 179.

9. **OPINIONS AND LEGAL CONCLUSIONS EXCLUDED: EXAMPLES.** It is not competent for a witness to state that the execution of a new note and mortgage had the legal effect to release a surety on a prior note; nor is it competent for him to testify to his understanding of an agreement, in response to a question as to what the agreement was; and after the plaintiff has stated that he does not remember what he paid for the note in suit, it is not competent to ask him to state "something near" what he paid for it. *Kelso v. Fitzgerald*, 266.
10. **VALUE OF THOROUGHBRED STALLION: COMPETENCY OF WITNESS.** A farmer engaged in raising horses for the market cannot be deemed wholly incompetent to testify to the value of a thoroughbred stallion with which he is acquainted. *Gere v. Council Bluffs Ins. Co.*, 272.
11. ———: **PRICE AT PRIOR SALE.** The price at which a thoroughbred stallion was sold in another state was properly excluded as evidence of his value eighteen months after such sale, especially where it appears that he was not in the same condition at the times referred to. *Id.*
12. **AUTHORSHIP OF LETTERS WRITTEN WITH TYPE-WRITER.** Letters written with a type-writer and received by defendant through the mail, and purporting to be answers to letters written by him to plaintiffs, were admissible in evidence against plaintiffs without further proof that they were written by them. *Davis' Sons v. Robinson*, 355.
13. **PRACTICE: READING PART OF DEPOSITION TAKEN BUT NOT USED BY ADVERSARY.** A party may introduce a deposition taken by his adversary, but which he declines to introduce. (See cases cited in opinion.) But whether he should be permitted to introduce a portion only of such deposition depends largely on circumstances. If the witness has been examined as to several transactions, he may introduce his whole testimony touching that transaction, without introducing his testimony as to other transactions; but he should not be allowed to introduce a part only of the testimony relating to but a single transaction, without introducing all that the witness has said on that subject. *Citizens Bank v. Rhutasel*, 316.
14. **PROPERTY COVERED BY CHATTEL MORTGAGE: IDENTITY: DESCRIPTION.** Parol testimony may be admitted to show the identity of property described in a chattel mortgage, but not to show what property is described in the mortgage, the mortgage itself being the best evidence of that. *Id.*
15. **CROSS-EXAMINATION: WHAT IS PROPER.** Questions asked in cross-examination, which have no relation to the subject on which the witness was examined in chief, should be excluded. *Id.*
16. **LETTERS TO PROVE LOCATION OF WRITER.** Letters shown to be in plaintiff's handwriting, and purporting to have been dated at A., are not, in the absence of evidence that they were received through the mails, competent evidence that plaintiff was at A. at the date of the letters. *Names v. Names*, 383.
17. **PERSONAL INJURY: VISITS OF PHYSICIAN.** In a suit based upon personal injury, the number of times plaintiff's physician called upon her to treat the injury was material as bearing on the question of the severity of the injury. *Fleming v. Town of Shenandoah*, 505.

18. **ERROR WITHOUT PREJUDICE.** The allowance of an improper question, though objected to, is no ground for reversal, when the answer given does not prejudice the appellant. *Id.*
19. **BILL OF SALE: NOT VARIED BY CONTEMPORANEOUS PAROL AGREEMENT: EXAMPLE.** Where a defense was founded upon a bill of sale absolute upon its face, a reply which set up that there was a contemporaneous oral understanding that the transaction was to be regarded as a mere bailment of the property, for a temporary purpose, was properly held bad on demurrer. See opinion for cases followed and distinguished. *Allen v. Bryson*, 591.
20. **VALUE OF ATTORNEYS' SERVICES: HYPOTHETICAL QUESTIONS.** Hypothetical questions to practicing attorneys as witnesses, to show the value, of certain legal services, approved. *Id.*
21. **ACTION ON BOOK ACCOUNT: COPY.** Since a book account cannot be proved by a copy taken from the book, it was error to allow plaintiff to testify that the exhibit attached to his petition was a correct copy of the account as it was kept at the time it accrued. *Halstead v. Cuppy*, 600.
22. **PAYEE OF NOTE AND MORTGAGE: PAROL TO CONTRADICT JUDGMENT.** Where a note and mortgage were put into judgment, but the judgment was silent as to the original payee of the note and mortgage, parol evidence that they were originally made to one not the judgment plaintiff was not a contradiction of the judgment record, and was properly admitted in this case. *Johnson v. Pennell*, 669.
23. **ACTION TO SET ASIDE CONVEYANCE AS FRAUDULENT: WHAT ADMISSIBLE UNDER GENERAL DENIAL.** Where it was sought to set aside a conveyance as fraudulent, and the answer was only a general denial evidence which tended to prove that defendant acquired title to the premises under the foreclosure of a valid mortgage given to a third party for a valuable consideration, the title to which he (defendant) acquired by lawful means, was admissible, without any special plea of such facts, because it tended to negative allegations which plaintiff was bound to prove. Such facts did not constitute a special defense. Compare Code, § § 2704, 2718. *Id.*
24. **NEGLIGENCE: WANT OF SKILL IN AGENT: EVIDENCE UNDER ISSUE.** Where plaintiff sought to recover damages suffered through the negligence or want of skill in defendant's agent, who had charge of the business in which the injury occurred, and his skill was put in issue, and plaintiff had offered evidence to prove his want of skill, held that it was error to refuse the defendant the opportunity to prove the agent's skill, notwithstanding such skill, if proved, would be no defense, if he was in fact careless in the particular act complained of. *Peterson v. Adamson*, 739.
25. **ERROR IN EXCLUDING: MATERIALITY MUST APPEAR.** While this court cannot say that there was error in not allowing answers to questions, unless it is made to appear what facts were intended to be proved thereby, yet counsel need not state in terms what they expect to prove, if it sufficiently appears on the face of the record without such statement. *Id.*
26. **OF APPOINTMENT OF ADMINISTRATOR.** See Administrator, 1.
27. **OF ADULTERY: NATURE OF EVIDENCE: WHAT IS SUFFICIENT.** See Adultery, 1.
23. **OF AGENCY: DECLARATIONS OF AGENT.** See Agency and Agent, 2.

29. CERTIFICATION OF TO SUPREME COURT. See Appeal, 3.
30. AGREEMENT TO, ON APPEAL OF EQUITY CASE. See Appeal, 5.
31. PAROL TO VARY WRITING. See Bill of Lading, 1, 2.
32. OF MORAL CHARACTER OF WITNESS. See Criminal Law, 3, 4.
33. FOR RULINGS ON EVIDENCE IN CRIMINAL CASES. See Criminal Law as follows:
- (1) UTTERING FORGED NOTE: POSSESSION OF OTHER LIKE NOTES. 6.
 - (2) CORROBORATION OF ACCOMPLICE: WHAT IS SUFFICIENT. 7.
 - (3) ACTS AND ADMISSIONS OF CONFEDERATES. 13.
 - (4) ATTEMPT TO ESCAPE. 14.
 - (5) CIRCUMSTANTIAL EVIDENCE: WHAT FACTS MAY BE PROVED BY. 20.
 - (6) LARCENY: POSSESSION OF STOLEN GOODS. 23.
 - (7) ASSAULT: ILL-FEELING ON PART OF DEFENDANT. 25.
34. USE OF DEPOSITION IN OTHER CAUSE BETWEEN SAME PARTIES. See Deposition, 1.
35. IN ACTION TO RECOVER PERSONAL PROPERTY. See Detinue, 1, 2.
36. AGAINST ADMINISTRATOR: COMPETENCY. See Estates of Decedents, 3.
37. OF FRAUD BETWEEN HUSBAND AND WIFE IN OBTAINING CREDIT. See Estoppel, 2.
38. OF WIFE'S SIGNATURE TO MORTGAGE. See Mortgage, 2.
39. CONTRADICTING WITNESS AS TO IRRELEVANT MATTER. See Practice, 1.
40. TO PROVE ESTOPPEL NOT PLEADED. See Practice, 3.
41. ADMISSION OF EVIDENCE OMITTED BY MISTAKE. See Practice, 4.
42. OBJECTION TOO LATE ON APPEAL. See Practice in Supreme Court, 29, 34.
43. LANGUAGE OF MORTGAGE TO EXPLAIN SECURED NOTE. See Promissory Note, 6.
44. BURDEN OF PROOF WHERE SIGNATURE TO NOTE IS DENIED. See Promissory Note, 7.
45. OPINIONS OF WITNESSES. See Railroads, 5, 6.
46. IN ACTION FOR PERSONAL INJURIES. See Cities and Towns, 3; County, 1; Railroads, 4, 5, 6, 7, 18, 20.
47. OF SUCCESSION TO CORPORATE RIGHTS. See Railroads, 15.

See WITNESS.

EXAMINATION OF WITNESSES.

See EVIDENCE, 6, 15.

PRACTICE, 1.

EXCEPTIONS.

1. TO INSTRUCTIONS: WHAT SUFFICIENT. See Practice, 2.

EXECUTION.

1. SALE WITHOUT NOTICE: ACTION FOR DAMAGES: CODE, § 3081. The penalty provided by § 3331 of the Code, for selling property on execution without giving the notice prescribed by § 3030, cannot be recovered where no actual damage has accrued. (*Coffey v. Wilson*, 65 Iowa, 270.) And where action was begun for damages and penalty, but the claim for damages was withdrawn, a judgment for the penalty was without warrant, and must be reversed. *Enfield v. Blyler*, 295.
2. LEVY ON EXEMPT PROPERTY: WAIVER AND ESTOPPEL BY FAILURE TO OBJECT: FACTS NOT CONSTITUTING. Under § 3072 of the Code, as amended by chapter 49, Laws of 1882, an execution defendant does not waive his right to hold property exempt from execution by failing to assert his claim when he learns of its seizure, unless the officer requires him to designate the property which he claims as exempt; nor does such silence work an estoppel, where it is not shown what, if any, expense was incurred by the officer in the keeping and sale of the property. *Angell v. Johnson*, 51 Iowa, 625, and *Moffitt v. Adams*, 60 Id., 44, distinguished. *Ellsworth v. Savre*, 449.
3. SALE OF LAND: RIGHTS OF TENANT END WITH DEED TO PURCHASER: CODE, § 3365, NOT APPLICABLE. A tenant in possession of land sold on execution, under lease from the execution defendant, can have no higher or better rights than his lessor, and he is charged with notice of the sale, and of the expiration of the time for redemption; and, if he sows a crop which he cannot reap within that time, it is his own folly, and he cannot hold the land for the purpose of reaping his crop, under § 3265 of the Code, which does not apply to such a case. (Compare *Doionard v. Groff*, 45 Iowa, 597, and *Martin v. Knapp*, 57 Id., 336.) *Wheeler v. Kirkendall*, 612.
4. PROCEEDINGS AUXILIARY TO: IMPRISONMENT OF DEBTOR FOR CONTEMPT: CONSTITUTIONALITY OF STATUTE. See Constitutional Law, 1; Contempt, 3.

See ATTACHMENT, 1.

EXECUTOR.

1. POWERS GRANTED BY WILL: CONSTRUCTION OF. See Will, 2.

EXEMPTION.

1. FROM EXECUTION: DUTY OF DEBTOR TO CLAIM HIS RIGHT. See Execution, 2.

See GARNISHMENT, 4.

FEDERAL COURTS.

See Courts, 1, 3.

FENCES.

1. DIVISION FENCE: NOT ON TRUE DIVISION LINE: OBLIGATION TO MAINTAIN. If parties use a fence as a partition between their farms, it is wholly immaterial whether it is on the exact boundary line or not, so far as the obligation to maintain the fence or contribute to its construction is concerned. *Card v. Dale*, 552.

FINDING OF FACT.

1. UPON CONFLICTING EVIDENCE, BY COURT, REFEREE OR JURY, NOT DISTURBED ON APPEAL.

See PRACTICE IN SUPREME COURT, 4, 8, 25, 27, 31.

FINES.

1. IMPOSED ON CHANGE OF VENUE: WHAT COUNTY ENTITLED TO: CODE, § 3370. Certain criminal cases were taken on change of venue from the plaintiff to defendant county, where they were tried, and fines were imposed on the defendants. A transcript of the judgment and an execution in each case was sent to the plaintiff county, where the defendants resided, but before any levy was made the defendants paid to the sheriff the amounts of the several judgments, and he returned the executions and paid over the money to the clerk of the defendant county. *Held* that the fines were "collected" in the defendant county, within the meaning of § 3370 of the Code, and belonged to the treasury of that county. *Pottawattamie Co. v. Carroll Co.*, 456.

FIRE LIMITS.

See CITIES AND TOWNS, 4, 5.

FORCIBLE ENTRY AND DETAINER.

1. NOTICE TO QUIT: MORE THAN THREE DAYS: JURISDICTION. Where the tenancy in question ended by agreement March 29th, and April 4th the lessor gave the lessee written notice to quit by the 5th day of May, *held* that, as the thirty days' notice required by § 2015 of the Code was not necessary. (*Grosvenor v. Henry*, 27 Iowa, 269,) an action of forcible entry and detainer could be maintained on the notice so given, as it answered the purpose of three days' notice required by § 3614. Defendant could not complain that more than three days' notice was given. *Shuver v. Klinkenberg*, 544.
2. ORIGINAL NOTICE: TIME FOR APPEARANCE: JURISDICTION. The fact that the original notice in an action of forcible entry and detainer was served nine days before the time fixed for appearance, in contravention of § 3617 of the Code, was a mere irregularity not depriving the court of jurisdiction to render judgment by default against defendant, and a motion to vacate the judgment and dismiss the action for want of jurisdiction was properly overruled. Compare *Shea v. Quintin*, 30 Iowa, 58. *Id.*

FORECLOSURE.

See MECHANIC'S LIEN, 3, 5.

MORTGAGE, 1, 5, 6.

FOREIGN STATUTES.

See DIVORCE, 1, 2.

NOTARY PUBLIC, 1.

FORGERY.

1. INDICTMENT: NAME OF PERSON DEFRAUDED NOT NECESSARY. See Criminal Law, 5.
2. UTTERING FORGED NOTE: EVIDENCE. See Criminal Law, 6.

FORMER ADJUDICATION.

1. NOTICE: EVIDENCE. Evidence of notice of the pendency of a former action considered, and *held* that plaintiff had legal notice thereof, and that he was bound by the decree therein. *Leyner v. Fuller*, 188.
2. ESTOPPEL: INSTANCE. Where an appeal was taken from a justice's judgment, and one of the parties procured a judgment of dismissal on the ground that the judgment appealed from was void for want of jurisdiction in the justice to render it, *held* that such party could not in another proceeding between himself and appellant be heard to say that the judgment appealed from was valid. *Sweezy v. Stetson*, 481.
3. BINDING UPON PRIVIES OF PARTIES. A decree rendered against a mortgagee of chattels, to the effect that the mortgages are void, is binding upon the assignees of the mortgagee, though not parties to the action. *Knoxville Nat. Bank v. Hanirick*, 588.
4. HOW FAR BINDING. A former adjudication in a cause between plaintiff and defendant's grantor does not bind plaintiff as to a question not raised in that cause. *Bradley v. Cole*, 650.

See SURETY, 2.

FRAUD.

1. AS DEFENSE TO CONTRACT: HOW PLEADED. While fraud is a good defense to a contract, it is not sufficient to plead it in general terms. The specific statements and acts relied upon as constituting the fraud must be set out, and, if these do not show fraud, the pleading is insufficient, and may be assailed by demurrer. *Mills & Co. v. Collins*, 164.
2. DURESS: EVIDENCE. Upon consideration of the evidence, (not set out in the opinion,) *held* that the fraud and duress pleaded as a defense to the note and mortgage in suit were not established. *Horton v. Ambrosen*, 270.
3. MORTGAGE TO SECURE SUM GREATER THAN DUE: BADGE OF FRAUD: EVIDENCE TO OVERCOME. Where a mortgage is taken for more than is due from a person known to be insolvent, it is incumbent on the mortgagee to show that the mortgage was made in good faith and for honest purposes, and to satisfactorily show why an amount greater than the actual indebtedness was secured by the mortgage; (*Lombard v. Dows*, 66 Iowa, 243;) but in this case it appears that the mortgagee did not know that the mortgagors were insolvent, or approaching insolvency, and the evidence (see opinion) otherwise sufficiently overcomes the presumption of fraud arising from the excess of the amount secured. *Carson, Pirie, Scott & Co. v. Byers & Eggers*, 606.
4. OBTAINING PREFERENCE IS NOT. A creditor has a right to secure his debt in good faith, even if he knows that his debtor has other creditors who will by his act be hindered in the collection of their claims. *Id.*
5. BETWEEN HUSBAND AND WIFE IN OBTAINING CREDIT: INCOMPETENT EVIDENCE. See Estoppel, 2.
6. OF AGENT: PRINCIPAL BOUND BY. See Principal and Agent, 6.
7. IN PROCURING VOTES FOR RAILROAD AID TAX. See Railroads, 81.

See FRAUDULENT CONVEYANCE.

GIFT, 1.

SCHOOL DIRECTORS, 1, 2.

FRAUDULENT CONVEYANCE.

1. OF NOTES: HUSBAND TO WIFE: FACTS NOT ESTABLISHING. The evidence in this case considered and *held* insufficient to show that a gift of certain notes by a husband to his wife was in fraud of creditors. *State v. Wallace*, 77.
2. OF LAND: NO RECOVERY BY GRANTOR OF GRANTEE: WHEN THE RULE DOES NOT APPLY. When one conveys his property to another with the purpose of hindering or defrauding his creditors, he will not be allowed to recover the property or its value from his grantee; but where the grantor was a young and ignorant man, and was induced by his uncle, who had been his advisor, to convey the property to him, in order to avoid being ruined by suits, which the uncle falsely represented that the young man's brothers and sisters were about to institute against him in order to deprive him of the inheritance which he had received from his father, *held* that the rule did not apply, and that judgment was properly rendered against the uncle in favor of his grantor for the damages suffered by reason of the fraud,—he having disposed of the property to an innocent purchaser. *Williams v. Collins*, 413.
3. OF LAND: INSUFFICIENT EVIDENCE. The evidence in this case *held* insufficient to set aside a title to land on the ground that it was held in fraud of creditors. *Johnson v. Pennell*, 669.
4. OF GOODS: PRESUMPTION AGAINST FRAUD NOT OVERCOME. The evidence in relation to a transfer of a stock of goods by their owner to an alleged creditor considered, (see opinion,) and *held* not sufficient to overcome the presumption which is always entertained against fraud. *Warfield, Howell & Co. v. Lynd*, 722.
5. ACTION TO SET ASIDE: EVIDENCE UNDER GENERAL DENIAL. See Evidence, 23.
6. OF CHATTELS: EVIDENCE. See Practice, 7.
See FRAUD, 3.

VOLUNTARY CONVEYANCE.

GARNISHMENT.

1. REPLY TO ANSWER OF GARNISHEE: ISSUES LIMITED BY. While it may be that a formal reply to the answer of a garnishee is not necessary in order to enable a plaintiff to dispute by evidence its truthfulness, yet, if plaintiff does file a reply setting up the facts upon which he bases his denial of the answer, the issues are limited thereby; and it was error in such a case for the court to present to the jury an issue of fraud not pleaded. *Freese & Ferguson v. Co-operative Coal Co.*, 42.
2. NOTICE TO PRINCIPAL DEFENDANT: WHAT NECESSARY. Where one is sued in attachment and brought into court by proper notice, and the attachment is served upon his supposed debtor by process of garnishment, no valid judgment can be rendered against the garnishee unless notice of the garnishment has also been served on the principal defendant, as required by § 2975 of the Code, as amended by chap. 58, Laws of 1880. The original notice in the action does not avail for the purpose of the garnishment. *Wise v. Rothschild Bros.*, 84.
3. OF JUDGMENT IN FAVOR OF EXECUTION DEBTOR, BUT IN FACT BELONGING TO ANOTHER. A judgment appearing of record in favor of the execution defendant, but which in fact belongs to another, cannot, by the garnishment process, be subjected to the execution, where it appears

that the execution plaintiff has been in no way prejudiced by the fact that the judgment appeared to belong to his debtor. In such cases the law will look to the very rights of the parties, and will not suffer an execution to be satisfied out of another's property. *Beaver Valley Bank v. Cousins & Spooner*, 310.

4. **EXEMPT PROPERTY HELD UNDER FRAUDULENT CHATTLE MORTGAGE: LIABILITY OF GARNISHEE FOR VALUE OF: JUDGMENT ON UNCERTAIN EVIDENCE.** Where the evidence showed that the garnishee held property of the execution debtor, to the value of \$700, under a chattel mortgage which was fraudulent, because made for the purpose of putting the property beyond the reach of creditors, but that a portion of the property so held was such as was exempt in the hands of the execution debtor, *held* that judgment could not be rendered against the garnishee for the value of such exempt property; and, since there was no evidence as to the value of the property so exempt, it was impossible for the court to determine for *how much* the garnishee was liable, and that it was error to render judgment against him for any amount whatever. *Brainard v. Simmons*, 646.

GIFT.

1. **FROM FATHER TO CHILDREN: UNDUE INFLUENCE: EVIDENCE.** The evidence in this case considered, (see opinion,) and *held* to establish the fact that the securities in question were given by the decedent to his children a short time prior to his death, and to reveal no fraud or undue influence brought to bear upon the father by the children to induce him to make the gift. *Samson v. Samson*, 253.
2. **EVIDENCE NOT ESTABLISHING.** The evidence in this case (not set out in opinion) *held* insufficient to establish the gift of a farm by plaintiff to defendant. *Fendrick v. Fendrick*, 518.
3. **SUBSEQUENT AGREEMENT TO PAY FOR NOT BINDING.** See Consideration, 1.
4. **OF REAL ESTATE: ORAL RESERVATION OF EASEMENT.** See Conveyance, 1.
5. **OF CHILD: POWER OF PARENT TO MAKE ORALLY.** See Domestic Relations, 2.

GOVERNOR.

1. **APPROVAL OF LEGISLATIVE ENACTMENTS BY.** See Legislation, 1.

GRAND JURY.

1. **DISCHARGE OF BECAUSE ILLEGALLY DRAWN: VALIDITY OF INDICTMENT FOUND BY NEW JURY.** See Criminal Law, 2.
2. **WHEN TERM OF SERVICE EXPIRES.** See Criminal Law, 8.

GUARANTY.

See PROMISSORY NOTE, 2.

GUARDIAN.

1. **SETTLEMENT WITH WARD: WORTHLESS NOTE TAKEN BY WARD: WHOM LOSS.** Defendant's wife was plaintiff's guardian, and defendant was the surety on her bond, but she died shortly before the time when she had given notice that she would make her final settlement, and defend-

ant took charge of the ward's estate and made the settlement, in which plaintiff accepted a note taken by the guardian for money loaned by her as such. The note was good when made, but proved to be worthless when so taken, but no representations were made by the defendant as to the solvency of the makers. Defendant's attorney, however, stated in the presence of both parties that he believed one of the makers to be good, whereupon the note was accepted. It does not appear that either the defendant or his attorney knew that the makers were insolvent. *Held* that, as there was no fraud practiced, and as defendant did not hold a fiduciary relation to plaintiff, he was not liable to her for the amount of the note. *Smith v. McKee*, 161.

2. **EXTENT OF AUTHORITY UNDER GENERAL APPOINTMENT.** One who is appointed guardian of a minor in general,—that is, without any limitation of his authority—is charged with the care and custody of the person as well as of the property of his ward. *Burger v. Frakes*, 460.

HABEAS CORPUS.

1. **MATTERS NOT REVIEWED BY.** *Habeas corpus* cannot be invoked for the purpose of obtaining relief for mere errors and irregularities of a court in a criminal trial, nor for the purpose of determining whether the offense for which the plaintiff is imprisoned is a crime under the statute, nor for the purpose of correcting an erroneous taxation of costs. *State v. Orton*, 554.

HIGHWAY.

See ROAD SUPERVISORS.

HOMESTEAD.

1. **OWNED BY WIFE UNDER BOND FOR DEED: ASSIGNMENT OF BOND WITHOUT HUSBAND'S CONCURRENCE: SUBSEQUENT ABANDONMENT: INNOCENT PURCHASER FROM ASSIGNEE.** Plaintiffs occupied a homestead which was owned by the wife under a bond for a deed. The wife assigned the bond without the concurrence of the husband. *Held* that the assignment was of no validity; (Code, § 1990; *Stinson v. Richardson*, 44 Iowa, 373;) and that it was not validated by the subsequent abandonment of the homestead. (*Bruner v. Bateman*, 66 Iowa, 488.) But where, after such abandonment, another, who had no notice of the facts rendering the assignment invalid, and no knowledge that plaintiffs claimed any interest in the property, purchased it from one in possession, who appeared to have a perfect record title, *held* that his title was superior in equity to the homestead rights of the plaintiffs. *Lunt v. Neeley*, 97.
2. **EXCHANGE: LIABILITY OF NEW ONE FOR FORMER DEBT.** When one exchanges an old homestead for a new one of greater value, the new one, to the extent of such excess in value, may be subjected to the payment of a judgment against the owner procured prior to the exchange; but the difference in value in such case must be estimated at the time of the exchange and not afterwards. *Atkinson v. Hancock & Co.*, 452.

See MORTGAGE, 1.

HUSBAND AND WIFE.

1. **POWER TO DISPOSE OF PERSONAL PROPERTY: DISTRIBUTIVE SHARE OF SURVIVOR.** The law places no restriction or limitation on the power of the husband to make such disposition of his personal property during his life-time as he may elect, even though the wife is thereby deprived of

the distributive share which otherwise would fall to her upon his death. *Samson v. Samson*, 253.

2. INJURY TO WIFE ON DEFECTIVE SIDEWALK: RECOVERY FOR LOSS OF TIME: RULE STATED AND APPLIED. It would *seem* that a married woman cannot recover for loss of time occasioned by an injury, if her occupation is only that of a housewife in her husband's family. See *Lyle v. Gray*, 47 Iowa, 153. But where she has a separate and independent employment, which she habitually follows, and for which she receives compensation from her employers, she may recover for loss of time. In this case, where plaintiff was habitually engaged in washing clothes for others for a regular compensation, *held* that she was entitled to prove the value of the time she had lost by the injury complained of. *Fleming v. Town of Shenandoah*, 505.
3. FRAUD PRACTICED BY IN OBTAINING CREDIT: INCOMPETENT EVIDENCE. See *Estoppel*, 2.

See MECHANIC'S LIEN, 4.

INDICTMENT.

1. FORGERY: NAME OF PERSON DEFRAUDED. See Criminal Law, 5.
2. NUISANCE: INTOXICATING LIQUORS: DUPLICITY. See Criminal Law, 9.

INHERITANCE.

1. OF PARENT FROM ADOPTED CHILD. See Domestic Relations, 3.

INJUNCTION.

1. POWER OF JUDGE TO GRANT IN VACATION: WHAT IS VACATION. A judge has authority to grant an injunction in vacation; (Code, § 3389-3394;) and the word vacation as here used means when the court is not actually in session, and is not to be restricted to the time between terms. *Thompson v. Benepe*, 79.
2. TO PREVENT TRESPASS: WHEN ALLOWED. A mere trespass will not be restrained by injunction when the injury will not be irreparable, and the trespasser is solvent, and adequate compensation in damages may be recovered by law; but if the injury will be irreparable, chancery will interfere by injunction to prevent it. *Bolton v. McShane*, 207.
3. NOT ALLOWED WHERE THERE IS REMEDY AT LAW: EXAMPLE: ENJOINING SALE OF MORTGAGED CHATTELS. One claiming to have a mortgage on chattels cannot have an injunction to restrain the sale of such chattels under another senior mortgage, on the ground that such chattels are not covered by such other mortgage; because he has an adequate remedy without the interference of equity, in that he may pursue the chattels, by virtue of his mortgage, at any time, into whosoever hands they may pass by the sale. *Rankin v. Rankin*, 322.
4. ALLEGATION OF INSOLVENCY AIDED BY ADMISSIONS OF DEFENDANTS. In plaintiff's petition for an injunction he alleges that defendants have but a small amount of property exempt from execution, and are not responsible for the damages occasioned by the wrongful acts sought to be enjoined. There was no motion for a more specific statement in the court below, but, on the other hand, it was conceded on the trial, for the purposes of the case, that defendants did not own a dollar's worth of property in the world. *Held* that it could not be urged on appeal to this court that the petition was insufficient in this respect to entitle plaintiff to an injunction. *Burroughs v. Saterlee*, 396.

5. **TO RESTRAIN CUTTING TIMBER: FORMER LICENSE: ESTOPPEL.** Because the owner of real estate has permitted another for several years to cut and remove timber therefrom, he is not thereby estopped from afterwards preventing him by injunction from continuing to do so. *Davis v. Hull*, 479.
6. **RECORD ON APPEAL: AFFIDAVITS USED ON HEARING BELOW.** See Appeal, 4.
7. **TO CONTROL ROAD SUPERVISORS.** See Road Supervisor, 1.
8. **TO RESTRAIN COLLECTION OF JUDGMENT: INSUFFICIENT GROUNDS FOR: PLACE OF SUIT.** See Venue, 1.
9. **TO RESTRAIN NUISANCE.** See Intoxicating Liquors, 4.

INNOCENT PURCHASER.

1. **OF LAND FROM ONE HOLDING TITLE BY FRAUD: JUDGMENT AFFECTING UNPAID PURCHASE MONEY.** W, by fraud procured the legal title to plaintiff's land and sold it to C., who had no knowledge of the fraud. In an action by plaintiff against W. and C., held that the court properly rendered judgment against W. for the damages which plaintiff had suffered by reason of the fraud, and properly required W. to surrender to plaintiff the unpaid notes and mortgage given by C. for purchase money, —the amount thereof, when paid, to be credited upon the judgment against W., but that it was error to decree that a failure of W. to deliver the securities to plaintiff should work an assignment of the debt to him, and that C. should in any event pay the money to plaintiff. C.'s payment to plaintiff should have been made to depend upon the delivery of the notes to him. *Williams v. Collins*, 413.
2. **ONE TAKING BY QUITCLAIM DEED IS NOT.** A purchaser of land by a mere quitclaim deed is charged with notice of all equities existing adverse to the title he derives under the deed. *Butler v. Barkley*, 491; *Bradley v. Cole*, 650.

See BILL OF LADING, 1, 2.

HOMESTEAD, 1.

INSTRUCTIONS.

1. **MUST BE CONFINED TO PLEADINGS AND EVIDENCE.** It is error to submit a material question of fact to the jury upon which there is no evidence; and it is equally erroneous to submit a question which is not presented by the pleadings. For an illustration of the violation of these rules, and for authorities cited, see opinion. *Whitsett v. Chicago, R. I. & P. Ry Co.*, 150.
2. **ASSUMPTION OF FACT WITHOUT EVIDENCE.** An instruction founded upon an assumption of fact of which there is no evidence should not be given to the jury. *Hand v. Langland*, 185.
3. **MUST CONFORM TO THEORY ON WHICH CASE IS TRIED.** Instructions should be harmonious with the theory on which the case is tried. For a violation of the rule see opinion. *Morris v. City of Council Bluffs*, 343.
4. **ASSUMPTION OF DEFENSE NOT PLEADED: DEFENSE NOT SUPPLEMENTED BY ALLEGATIONS IN COUNTER-CLAIM.** An instruction based upon the theory that a certain defense was set up in the answer, which was not in fact set up, unless the defensive portion of the answer be supplemented

by allegations contained in other divisions stating counter-claims, *held* erroneous; as each affirmative defense must be stated in a distinct division of the answer, and must be sufficient in itself. Code, § 2657. *Davis' Sons v. Robinson*, 355.

5. **MUST BE SUPPORTED BY EVIDENCE.** Instructions based upon a theory of which there is no evidence cannot be sustained. *Cornett v. Phenix Ins. Co.*, 388.
6. **AS TO PLEADINGS: ERROR CURED BY OTHER INSTRUCTIONS.** A failure to instruct the jury that the allegations of the petition are denied by the answer is no ground for reversal where, by other instructions the jury is told that plaintiff cannot recover unless he establishes the material allegations of his petition by a preponderance of the evidence. *Gunsell v. McDonnell*, 521.
7. **MORE SPECIFIC THAN THE ISSUE, BUT WARRANTED BY EVIDENCE.** Where the petition alleged a special property in a buggy without stating the nature and extent of such property, and defendants, instead of moving for a more specific statement, put the allegation in issue as made, and the evidence showed the nature and extent of plaintiff's property, *held* that an instruction which recognized the nature and extent of his property, as shown by the evidence, was not erroneous as not being warranted by the issues. *Id.*
8. **REPETITION NOT NECESSARY.** It is not error to refuse to give instructions asked when the points thereof are fully covered by instructions given. *McClellan v. Chicago, I. & D. R'y Co.*, 568.
9. **AS TO IMMATERIAL DEFENSES: REFUSAL TO GIVE IS NOT ERROR: EXAMPLE.** Refusing to give instructions with reference to immaterial questions, or matters which are pleaded by way of defense, but which do not constitute a defense in law, is not prejudicial to the party who seeks to raise the immaterial questions, or who has pleaded the incompetent matter, and is no ground for reversal. For illustration see opinion. *Tuck v. Singer Manf'g Co.*, 576.
10. **SUBMITTING IRRELEVANT ISSUE WITHOUT EVIDENCE: ERROR WITHOUT PREJUDICE.** Submitting to the jury a question on which there was no evidence was error, but where the effect of such error was to require plaintiff to prove an allegation not necessary to his recovery, and the jury yet found for plaintiff, *held* that the error in giving the instruction was without prejudice to defendant, and was no ground for reversal. *Id.*
11. **REPETITION NOT REQUIRED.** Where the court gave the substance of an instruction asked, it was not error to refuse to give the instruction in the form in which it was asked. *State v. Reno*, 587.
12. **AS TO CONTRIBUTORY NEGLIGENCE.** See County, 2.
13. **EXCEPTIONS TO: WHAT SUFFICIENT.** See Practice, 2; **TIME OF TAKING.** See Practice in Supreme Court, 9.
14. **AS TO ESTOPPEL NOT PLEADED.** See Practice, 3.
15. **AS TO BURDEN OF PROOF.** See Principal and Agent, 4

See PRINCIPAL AND AGENT, 1.

INSURANCE.

(1) *Fire Insurance.*

1. **PROVISION IN POLICY FOR ARBITRATION: CONDITION PRECEDENT TO ACTION: EVIDENCE.** The policies sued on contained a condition in these words: "In case differences shall arise as to the amount of loss or damage, the subject shall, at the request of either party, be referred to *
* arbitrators * and their award in writing shall be binding as to the amount of such loss or damage." *Held* that a submission to arbitrators under this agreement was not a condition precedent to the maintenance of an action upon the policies, and that a demurrer to the petition, based upon a neglect and refusal of plaintiff to so submit to arbitrators, was properly overruled. Whether, on the trial of the cause, the amount of the loss or damage could have been proved, against defendant's objection, by any other evidence than the award of arbitrators, is a question suggested but not decided, because it does not arise upon the record. *Gere v. Council Bluffs Ins. Co.*, 272.
2. **FALSE REPRESENTATIONS AS TO VALUE: EVIDENCE.** The owner of a horse had him insured upon the statement that he cost him \$1,200. *Held* that evidence of a prior sale of the horse for \$50 to the person of whom the insured bought him did not tend to prove that the statement made by the assured was false, and was properly excluded. *Id.*
3. **VALUE OF PROPERTY DESTROYED: INSTRUCTION.** When the insured property which was destroyed was not shown to have a distinctly recognized market value, the court properly instructed the jury to allow the fair value of the property. *Id.*
4. **ACTION BY ASSIGNEE OF POLICY: EVIDENCE OF AMOUNT PAID FOR POLICY.** Where defendant admitted the assignment by the assured to the plaintiff of his claim under the policy, it was immaterial whether plaintiff paid anything for the claim or not, as no recovery could afterwards be had by the assignor. *Id.*
5. **WAIVER OF PROOF OF LOSS: FACTS NOT AMOUNTING TO.** A refusal to pay a claim made under a policy of insurance does not constitute a waiver of proofs of loss, unless it is of such kind and made under such circumstances as to justify the inference that such proofs would be unavailing, if made. And so, where a horse was insured against fire and lightning only, but the insured claimed that, though the horse died of disease, the company was liable for the loss, and the company refuse to pay if the horse died from any other cause than fire and lightning, such refusal was not a waiver of the proofs of loss required by the policy, but was rather a demand for proof that the horse died by fire or lightning. *Cornett v. Phenix Ins. Co.*, 388.
6. **ACTION BARRED BY LIMITATION IN POLICY.** The policy in question provided that no action thereon should be sustainable unless brought within six months after the loss. The proofs of loss required by the policy were neither made nor waived within that time. *Held* that chapter 211, Laws of 1890, (Miller's Code, p. 299,) has no application to such a case, and that the action, not having been brought within the six months, was barred. *Id.*
7. **PLEADING WAIVER OF PROOFS OF LOSS: MOTION TO MAKE MORE SPECIFIC.** Where one seeking to recover upon a policy of insurance pleads that the company has waived the proofs of loss required by the policy, he should, upon a proper motion, be required to state whether the alleged waiver was oral or in writing, and by what officer or agent of the company it was made. *Webster v. Continental Ins. Co.*, 393.

8. **INTEREST OF ASSURED AS DETERMINED FROM CONSTRUCTION OF DEED: POLICY FORFEITED BY FAILURE TO DISCLOSE TRUE INTEREST.** The policy sued on provided that if the interest of the assured in the property was not absolute, it must be so stated in the policy, or it would be void. The deed under which the assured held contained the following clause as a part of the description of the property and estate conveyed: "The intention being to convey to (the grantee) a life estate in said real estate, and at her death to then vest the title in her children." *Held* that the assured had only a life estate, and that, as the fact of her limited estate was not stated in the policy, it was void by its own terms, and no recovery could be had thereon. *Davis v. Iowa State Ins. Co.*, 494.

(2) *Life Insurance.*

1. **DEFAULT IN PAYMENT OF ANNUAL DUES AND ASSESSMENTS: WAIVER OF DEFAULT AND RESTORATION OF POLICY: FACTS NOT CONSTITUTING.** Plaintiff's husband held a life policy for her benefit in the defendant company, but certain assessments and dues were overdue Dec. 7, 1882, whereby the policy was forfeited, when defendant's secretary wrote him, in substance, that if he would remit immediately he would send receipt without default. Remittance was not then made, but on the twenty-fifth of that month plaintiff's husband was taken sick, and on the thirty-first of the month he died. On the thirtieth, however, at his request, the plaintiff remitted the money, and it was received at defendant's office January first, and receipts were returned in printed form, each containing the provision that it should be valid only on condition that the assured was alive and in good health on the day of its date; but there was *written*, in the hand of the secretary, on the margin of each receipt the words "no default." After defendant was informed of the death of the assured, it returned the money to plaintiff. *Held*—

- (1) That, because remittance was not made immediately upon receipt of the letter of Dec. 7, the offer therein contained to waive the default was at an end.
- (2) That, since the assured was not alive at the date of the receipts, the receipts were invalid by their own terms. The written words "no default" not being repugnant to the printed conditions of the receipts, they are to be construed in connection therewith; and the true meaning is that there should be no default provided the assured was alive and in good health at the time of their date. *Servoss v. Western Mut. Aid Soc.*, 86.

INTEREST.

1. **JUDGMENTS BEAR BUT SIX PER CENT. UNLESS THE RECORD OTHERWISE SPECIFICALLY PROVIDES.** See Judgment and Decree, 8.
2. **ON NOTE: WHEN PAYABLE: CONSTRUCTION.** See Promissory Note, 4.

See TAXES, 2.

INTOXICATING LIQUORS.

1. **NUISANCE: SALE OF LIQUORS BY CLERK: INTENTION OF PRINCIPAL: CODE, § 1543.** Defendant was charged with nuisance, under section 1543 of the Code, for keeping a place for the unlawful sale of intoxicating liquors. *Held* that if he kept the liquors with the intent that they should be sold only for lawful purposes, and himself made only lawful sales of such liquors, he was not criminally liable on account of unlawful sales thereof made by his clerk,—the unlawful intent being an essential ingredient of the crime. *State v. Hayes*, 27.

2. **WRONGFUL SALE TO HUSBAND: ACTION BY WIFE FOR DAMAGES: EVIDENCE.** Plaintiff's action was based upon the wrongful sale to her husband of intoxicating liquors during six months previous to the action, whereby she was injured in her person, property and means of support. *Held* that evidence of personal injuries inflicted upon her by her husband, as the result of his intoxication, more than six months prior to the beginning of the action, was irrelevant to the issue. *Applegate v. Winebrenner*, 235.
3. ———: ———: ———: **INDICTMENTS.** In such action, where the owner of the saloon property was joined as defendant for the purpose of making the judgment to be obtained a lien on the property, *held* that former indictments against the principal defendant for the unlawful sales of intoxicating liquors, not shown, however, to have been made to plaintiff's husband, were not competent as evidence for the purpose of charging the owner of the property with knowledge of the wrongful sales in the premises. *Id.*
4. **NUISANCE: INJUNCTION.** *Littleton v. Fritz*, 65 Iowa, 488, followed. *Shermerhorn v. Webber*, 278.
5. **SALE BY PHARMACISTS WITHOUT PERMIT NOT AUTHORIZED BY STATUTE.** If section 8 of chapter 75, Laws of 1830, had the effect to repeal the provisions of the Code forbidding apothecaries, as well as other persons, to sell intoxicating liquors without a permit, chapter 143, Laws of 1834, repeals said section 8, and enacts a general prohibitory law, without exceptions in favor of pharmacists; and the result is that licensed pharmacists may not, under existing legislation, (December, 1885,) sell intoxicating liquors without a permit. *State v. Bissell*, 616.
6. **SALE BY UNLICENSED PHARMACIST THROUGH LICENSED CLERK.** An unlicensed pharmacist who conducts a drug-store cannot escape the penalty of the law for the unlawful sale of intoxicating liquors, by showing that the sales were made for medicinal purposes by his clerk, who was a licensed pharmacist; and evidence of such alleged facts was properly excluded. *State v. Norton*, 641.
7. **GRANTING PERMIT BY SUPERVISORS: REVIEW OF PROCEEDINGS BY CERTIORARI.** Under the provisions of § 1530 of the Code, any resident of the county may appear and show cause why a permit to sell intoxicating liquors should not be granted to an applicant therefor; and a resident of the county who thus becomes a party to such proceeding is entitled to have the proceedings reviewed on *certiorari*, in a proper case, notwithstanding he has no pecuniary or property interest that is affected by the action of the board. *Welch v. Board of Supervisors*, 23 Iowa, 199, and other similar cases, distinguished. *Darling v. Boesch*, 702.
8. ———: ———: **WHAT QUESTIONS CONSIDERED.** The decision of a board of supervisors on questions of fact involved in a proceeding cannot be reviewed on *certiorari*. (*Tiedt v. Carstensen*, 61 Iowa, 334.) And so a court cannot review the finding of the board on the question of the good moral character of an applicant for a permit to sell liquors, or as to whether the granting of the permit was necessary for the accommodation of the neighborhood; but where the complaint is that the board acted without any certificate of good moral character being presented to the county auditor, as required by law, a question of jurisdiction is raised, which is proper to be considered on *certiorari*. *Id.*
9. **PROHIBITORY AMENDMENT TO CONSTITUTION INVALID.** See Constitution, 1.
10. **NUISANCE: INDICTMENT: DUPLICITY.** See Criminal Law, 9.

JOINDER.

See MISJOINER.

JUDGMENT AND DECREE.

1. JUDGMENT: LIEN ON BUILDING ERECTED ON LEASED LAND: SUBSEQUENT MORTGAGE OF BUILDING: PRIORITY OF LIEN. A building erected by a tenant on leased land, which cannot be removed by him, becomes attached to the leasehold, and a judgment against the tenant becomes a lien on the building and leasehold, superior to the lien of a subsequent mortgage of the building as a chattel. Whether the same rule would obtain in case the building was erected for the purpose of trade, subject to removal by the tenant, is not decided; but compare *First Nat. Bank of Davenport v. Bennett*, 49 Iowa, 537, and *Walton v. Wray*, 54 Id., 531. *Hayden & Co. v. Goppinger*, 106.
2. ACTION TO CANCEL VOID JUDGMENT: IN WHAT COURT BROUGHT: JURISDICTION. Where a judgment is absolutely void, because no notice of the action was served on the defendant, an original action in chancery to cancel the judgment may be maintained in any court having jurisdiction of such matters, and the power to grant relief is not limited to the court in which the judgment was rendered. *Arnold v. Hawley*, 313.
3. —: NECESSITY OF NEGATING INDEBTEDNESS. If a judgment which is void for want of jurisdiction of the judgment defendant is to be regarded as *prima facie* evidence of indebtedness, (which is doubted,) and if, consequently, it is necessary to deny the existence of any indebtedness upon the cause of action on which the judgment was rendered, in order to state a good cause of action in equity for the cancellation of the judgment, then the petition in this case (see opinion) sufficiently denied such indebtedness, and the demurrer thereto, which admitted the allegations thereof, was properly overruled. *Id.*
4. JUDGMENT OF DISMISSAL FOR WANT OF PROSECUTION: MOTION TO SET ASIDE: SICKNESS OF COUNSEL. The sickness of counsel is sometimes a sufficient excuse for want of action in a case; but not where such sickness has been so long protracted that the client should in diligence have employed other counsel to try the case, unless it is made to appear that other counsel could not conduct the case as well as the disabled attorney. In this view, the refusal of the trial court to sustain a motion to set aside the judgment of dismissal is not disturbed on appeal. *Snell v. Iowa Homestead Co.*, 405.
5. JUDGMENT AGAINST HOLDER OF NAKED TITLE: NO LIEN ON THE LAND. Where the legal title to land passes through a judgment debtor as a mere conduit, he having no interest in the land, the judgment does not attach thereto as a lien. *Atkinson v. Hancock & Co.*, 452.
6. JUDGMENT: ACTION TO SET ASIDE BY ONE BOUND TO INDEMNIFY THE JUDGMENT DEFENDANT: COLLUSION: NOTICE. Plaintiff, believing that defendant B. had no valid claim against defendant G., growing out of a transaction in which they were all interested, agreed to indemnify G. against any judgment which B. might recover against him. Afterwards B. brought his action against G. and obtained judgment by default. G. hastily paid the judgment and threatened to sue plaintiff on his contract. Plaintiff in this action seeks to set aside the judgment on the ground of collusion between B. and G. But it appears that G. notified plaintiff of the pendency of the action, and that he had a right, under his contract of indemnity, to appear and defend thereto, but that, when he received the notice, he had forgotten about this provision in the contract, and so made no defense. The circuit court granted the relief asked by plaintiff, and B. alone appealed. *Held* that as against B. the decree contravened well-recognized principles relating to the conclusiveness of judgments, and that it must be reversed. *Merrill v. Bowe*, 636.

7. JUDGMENT BY DEFAULT: ON WHAT TERMS SET ASIDE: AFFIDAVIT OF MERITS. A judgment by default cannot be set aside without an affidavit of merits on the part of the defendant. (Code, § 2371.) But such an affidavit must set out the facts constituting the defense, and not the affiant's mere conclusion that he has a good defense. See authorities cited in opinion. *McGrew v. Downs*, 687.
8. JUDGMENT: INTEREST ON: SIX PER CENT UNLESS OTHERWISE SPECIALLY STATED. In order that a judgment on a contract drawing more than six per cent interest may draw the same interest, it must be so expressed in the judgment itself. Code, § 2078. So, where a plaintiff was entitled to have his judgment bear interest at ten per cent, but by oversight the rate of interest was not expressed in the judgment, *held* that he could not, without first having the error corrected by proper proceedings, enforce the judgment for more than its face and six per cent interest. *Rice v. Hulbert*, 724.
9. JUDGMENT IN ACTION TO RECOVER SPECIFIC CHATTELS. See *Detinue*, 1; *Replevin*, 1.
10. DECREE AGAINST HUSBAND ALONE AS TO TITLE: EFFECT ON WIFE'S DOWER. See *Dower*, 1.
11. JUDGMENT FOR MONEY ON FAILURE TO DELIVER PROPERTY: DEMAND NECESSARY. See *Landlord and Tenant*, 1.
12. JUDGMENT EXCESSIVE: EFFECT OF REMITTITUR ON APPEAL. See *Practice in Supreme Court*, 14.
13. JUDGMENT: ACTION TO RESTRAIN COLLECTION OF: INSUFFICIENT GROUND FOR: PLACE OF SUIT. See *Venue*, 1.

JUDICIAL SALE.

See *EXECUTION*, 1, 3.

JURISDICTION.

1. OF TRIAL COURT TO CORRECT RECORD AFTER APPEAL TAKEN. See *Appeal*, 2.
2. OF ACTION TO CANCEL VOID JUDGMENT. See *Judgment and Decree*, 2.
3. OF JUSTICES OF THE PEACE: NON-RESIDENT INSURANCE COMPANIES. See *Justices' Courts*, 1.
4. OF COURT TO CHANGE RECORD. See *Appeal*, 2; *Practice*, 6.

See *COURTS*.

FORCIBLE ENTRY AND DETAINER, 1, 2.

NOTARY PUBLIC, 2.

JURORS AND JURY.

1. JURY: NOT LESS THAN TWELVE: CODE, § 2793: CONSTITUTIONALITY. The jury contemplated by the constitution is the jury recognized by the common law, which is constituted of twelve men. It follows that a verdict by a jury of less than twelve men is of no effect unless the objection is waived, and that § 2793 of the Code, authorizing a verdict from ten or eleven jurors, when the jury has been reduced to that number by sickness, is in conflict with the constitution. *Eshelman v. Chicago, R. I. & P. R'y Co.*, 296.

2. ———: SUBMISSION OF CAUSE TO ELEVEN MEN: OBJECTION NOT WAIVED. Where one of the jurors was sick and absent, and defendant objected to proceeding with eleven jurors, it did not waive the objection by moving for judgment upon a special verdict returned by the eleven. *Id.*
3. TAKING PHOTOGRAPHS INTRODUCED IN EVIDENCE TO JURY ROOM. See Evidence, 4.
4. ALLOWING REPORTER TO READ NOTES OF EVIDENCE TO JURY. See Practice, 9.
5. RULINGS ON CHALLENGES TO JURORS: REVIEW OF IN SUPREME COURT. See Practice in Supreme Court, 6.
6. VIEW OF LOCUS IN QUO. See Railroads, 10.

JURY TRIAL.

1. RIGHT TO: EQUITABLE ISSUES RAISED BY CROSS-PETITION IN LAW ACTION. When an action is begun by ordinary proceedings, but a cross-petition is filed showing facts under which complete relief cannot be granted at law, the case is a proper one for equitable cognizance, and the plaintiff cannot insist on a trial by jury. *Marling v. Burlington, C.R. & N.R'y Co.*, 331.

See CONSTITUTIONAL LAW, 1.

JUSTICE OF PEACE.

See JUSTICES' COURTS.

JUSTICES' COURTS.

1. JURISDICTION OF NON-RESIDENT INSURANCE COMPANIES: CODE, § § 2584, 3507. Section 2584 of the Code confers jurisdiction upon a justice of the peace of an action brought on a policy of insurance insuring property within his county, where the loss occurs, although the principal office or place of business of the insurance company is in another county. Code, § 3507, distinguished. *Hunt v. Farmers' Ins. Co.*, 742.
2. PRACTICE: ISSUING ORIGINAL NOTICES WITH APPEARANCE DAY LEFT BLANK. See Statute of Limitations, 1.

LAND.

See RIPARIAN RIGHTS, 1.

DES MOINES RIVER LANDS.

PUBLIC LANDS.

RAILROAD LANDS.

LANDLORD AND TENANT.

1. FIELD-CROPPER: SHARE OF CROPS FOR RENT: FAILURE TO DELIVER: MONEY JUDGMENT: DEMAND NECESSARY. In March, 1882, plaintiff leased to defendant, as a "field-tenant or cropper," certain land to be planted to corn, he to have delivered to him as rent one-third of the corn raised. No time was fixed when the lease should terminate, nor when the corn should be delivered. On the fourth day of the following

December, plaintiff sued defendant for a money judgment on account of corn not delivered, without having made any previous demand for the corn. *Held* that, although the lease terminated by operation of law (Code, § 2015,) on the first day of December, that provision of law did not amount to an agreement between the parties that the corn should then be delivered; and, in the absence of a stipulation on that point, plaintiff could not recover a money judgment without first having demanded the corn. Code, § 2097. *Johnson v. Shank*, 115.

2. RENT ON FARM LEASE: WHEN DUE: CONSTRUCTION OF LEASE. The lease on which this action for rent was brought provided that "when the crop matures, or any portion of it shall be fit for market, the rent shall become due." *Held* that the rent became due when the oats were in stack and the corn was all ripe, and that it was not necessary for the oats to be threshed and the corn gathered before an action for rent could be maintained. *Hull v. Stogdell* 251.
3. TENANT OF EXECUTION DEBTOR: RIGHTS END WITH SHERIFF'S DEED FOR LAND. See Execution, 3.

LARCENY.

1. PRESUMPTION OF GUILT FROM POSSESSION OF STOLEN GOODS. See Criminal Law, 17, 23.
2. PUNISHMENT FOR. See Criminal Law, 21.

LAWS.

See FOREIGN STATUTES.

LEGISLATION.

STATUTES.

STATUTES CITED, CONSTRUED, ETC.

LEASE.

See LANDLORD AND TENANT.

LEASEHOLD.

1. JUDGMENT LIEN ON. See Judgment and Decree, 1.

LEGISLATION.

1. APPROVAL OF GOVERNOR: WHEN NECESSARY: REPEAL OF CODE, § 1527. Under § 16 of article 3 of the constitution, bills which are presented to the governor within the last three days of a session of the general assembly, and which he neither signs, nor returns with objections, before the adjournment, become laws only in case he subsequently approves them. It is not sufficient that he return the bill within thirty days after the adjournment without his approval. Accordingly, a bill passed by both houses of the Nineteenth General Assembly, repealing § 1527 of the Code, which requires an applicant for a permit to sell intoxicating liquors to present to the county auditor a certificate of good moral character, *held* never to have become a law, and that the section was not thereby repealed. *Darling v. Bossch*, 702.

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

LETTERS.

1. AUTHORSHIP OF LETTERS WRITTEN WITH TYPE-WRITER. See Evidence, 12.
2. USE OF LETTERS TO PROVE LOCATION OF WRITER. See Evidence, 16.

LEVY.

See EXECUTION, 2.

LICENSE.

See INTOXICATING LIQUORS, 5, 6, 7, 8.

LIEN.

1. ACTION TO ENFORCE: KIND OF PROCEEDINGS. See Administrator, 2.
2. JUDGMENT LIEN ON BUILDING ON LEASED LAND: SUBSEQUENT MORTGAGE OF BUILDING: PRIORITY. See Judgment and Decree, 1.
3. JUDGMENT AGAINST HOLDER OF NAKED TITLE IS NO LIEN ON LAND. See Judgment and Decree, 5.
4. TWO MORTGAGES AS PARTS OF SAME TRANSACTION: PRIORITY. See Mortgage, 3.

See MECHANIC'S LIEN.

PRIORITY OF RIGHTS.

TAXES, 2.

VENDOR'S LIEN.

LIFE INSURANCE.

See INSURANCE, (2)

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MALICIOUS PROSECUTION.

1. OF CIVIL ACTION: RECOVERY FOR: RULE STATED. There can be no recovery for the malicious prosecution of a civil action unless the defendants in such action have suffered by reason thereof some loss, annoyance or inconvenience which may not be regarded as incident to every civil action. *Wetmore v. Mellinger*, 64 Iowa, 741, followed. *Smith v. Hintrager*, 109.

MARRIED WOMEN.

1. RIGHT TO RECOVER FOR LOSS OF TIME IN ACTIONS FOR PERSONAL INJURIES. See Husband and Wife, 1.

MASTER AND SERVANT.

1. AS TO RAILWAY COMPANIES AND THEIR EMPLOYEES. See Railroads, *passim*.

MEASURE OF DAMAGES.

See TELEGRAPH COMPANIES, 1.

MECHANIC'S LIEN.

1. **FILING OF: EVIDENCE OF CLERK'S SIGNATURE.** The claim for a mechanic's lien in this case was marked "filed," over the signature of one who appeared from a jurat attached and belonging to the same paper to be the clerk of the district court. *Held* that it appeared, at least *prima facie*, that the person who marked the paper as filed was the clerk of the district court. *Ewing, Jewett & Chandler v. Folsom*, 65.
2. **SUB-CONTRACTOR: NOTICE FILED AFTER THIRTY DAYS: RECOVERY LIMITED TO AMOUNT DUE.** By the agreement between the owner and the contractor, a claim which the former held against the latter was to be allowed as a payment on the last installment to be paid under the contract. The sub-contractor's claim for a lien was filed more than thirty days after the last item in his account. *Held* that he could recover only what remained due from the owner to the contractor, after deducting the claim aforesaid. *Miller's Code*, § 2134. *Id.*
3. **FORECLOSURE: PLEADING: IDENTIFICATION OF PROPERTY.** Where the petition described the land on which the house on which the work was done was situated, and the answer admitted that defendant was the owner of the building on the land described in the petition, and the claim for a lien was offered and received in evidence, and the evidence all the way through showed that the work was done on defendant's house, *held* that it was error to refuse to establish a mechanic's lien, on the ground that there was no evidence that the labor was performed on the house and premises described in the petition, and on which plaintiffs claimed a lien. *Pease v. Thompson*, 70.
4. **ON WIFE'S PROPERTY: LUMBER BOUGHT BY HUSBAND ON HIS CREDIT AGAINST HER WILL.** Where a husband, against his wife's protest, purchased lumber on his own credit, and used it to build an addition to a barn on the wife's land, *held* that a mechanic's lien did not attach to the land, nor to the improvement made with the lumber, for the price thereof. *Getty & Born v. Tramel*, 283.
5. **PETITION TO ESTABLISH BY AMENDMENT IN LAW ACTION: MISJOINDER: PRACTICE.** No other cause of action can be joined with an action to establish a mechanic's lien. (*Code*, § 2510.) Hence, where an action at law was begun against one of the defendants upon a promissory note, and plaintiffs afterwards filed an amendment bringing in other parties, and seeking the foreclosure and establishment of a mechanic's lien, *held* that a motion to strike out the amendment, or else to compel plaintiffs to elect on which cause of action they would stand, was properly sustained; and, when plaintiffs refused to elect, the court was justified in striking the amendment from the files and in proceeding with the original cause of action. Plaintiffs should have elected on which cause they would stand, or else they should have filed separate petitions, as provided by section 2634 of the Code. *Sweetzer & Currier v. Harwick*, 438.

MISJOINDER OF ACTIONS.

See MECHANIC'S LIEN, 5.

MISTAKE.

1. **PAYMENT: EVIDENCE.** The evidence in this case considered (but not set out in the opinion) and *held* to warrant the judgment of the trial court based upon a finding of mistake in the payment of money. *Paine v. Frost*, 282.

2. **OF CLERK IN COMPUTING AMOUNT TO REDEEM FROM EXECUTION SALE: RECTIFICATION.** See Redemption, 1.
3. **IN DESCRIPTION OF LAND IN VOLUNTARY CONVEYANCE: NO RELIEF IN EQUITY.** See Voluntary Conveyance, 1.

MORTGAGE.

1. **ON LAND INCLUDING HOMESTEAD: FORECLOSURE: RIGHT OF JUNIOR MORTGAGEE TO ASSIGNMENT: CODE, § 3323.** Plaintiff began an action to foreclose her senior mortgage on two hundred and forty acres of land, of which forty acres were the homestead. A junior mortgagee, whose mortgage covered all the land but the homestead, was made defendant, and he brought into court the money to pay off the senior mortgage, and demanded an assignment thereof to himself, under section 3323 of the Code. *Held* that he was entitled to an assignment of the senior mortgage only as to the land not included in the homestead. Since the homestead could be sold under the senior mortgage only after exhausting the other land, (Code, § 1993,) and could in no case be subjected to the satisfaction of the junior mortgage, an assignment of the senior mortgage as to the homestead could be of no avail in effectuating the purpose of section 3323. *Grant v. Parsons*, 31.
2. **QUESTION OF WIFE'S SIGNATURE: CONFLICTING EVIDENCE CONSIDERED.** In an action to foreclose a mortgage, the wife, whose name was subscribed thereto, denied that she ever executed the mortgage, and there was other evidence tending in some small degree to corroborate her. But the notary public before whom the mortgage purported to be acknowledged testified that he knew the wife, and that she did sign it in his presence. In view of the principle that instruments requiring acknowledgment before an officer ought not to be set aside without clear and satisfactory evidence, *held* that the district court was warranted in finding that the wife executed the mortgage. *Herrick v. Musgrove*, 63.
3. **TWO MORTGAGES: PARTS OF SAME TRANSACTION: CONSTRUCTION AS TO QUESTION OF PRIORITY.** Two mortgages made by the same persons, on the same land, as parts of the same transaction, but dated on two consecutive days, and each referring to the other, construed, (see opinion,) and the question of priority determined. *Trustees of Iowa College v. Fenno*, 244.
4. **SALE OF THE MORTGAGED LAND IN PARCELS: ORDER OF LIABILITY.** Where land encumbered by mortgage is conveyed in parcels to different persons at different times, the parcels are chargeable with the mortgage debt *pro rata*, and not in the inverse order of their alienation. *Huff v. Farwell*, 298.
5. **RELEASE OF LAND BY HOLDER, BUT NOT OF RECORD: PURCHASER OF MORTGAGE WITH NOTICE BOUND BY RELEASE: LIABILITY OF RELEASOR TO RELEASEE.** Where the holder of a mortgage on land for a valuable consideration paid by the owner of a portion of the land, agrees to release such portion from the operation of the mortgage, but such release is not made of record, a purchaser of the mortgage from such holder, with notice of such agreement, is bound thereby, and cannot afterwards enforce the mortgage against such portion of the land. And where such releasee was made a party to an action of foreclosure, brought by a purchaser of the mortgage from the releasor with notice of the release, and the releasee, instead of pleading his defense against the plaintiff, set up a cross-bill for damages against his co-defendant, the releasor, on account of his failure to enter the release of record, *held* that a judgment on such cross-bill could not be sustained, because the failure to enter the release of record did not, under the circumstances, work any damage to the releasee. *Id.*

6. SECURING SUCCESSIVE NOTES: SALE OF NOTES TO DIFFERENT PARTIES AND SEPARATE FORECLOSURES THEREON: SALE OF MORTGAGED PREMISES TO ONE OF THE NOTE-HOLDERS: EQUITIES AND RIGHTS OF REDEMPTION AS BETWEEN THE SEVERAL PARTIES. See opinion for facts and conclusions of law. *Hutchinson v. Wells*, 430.
7. NOTICE OF SENIOR BUT UNRECORDED MORTGAGE: NEW MORTGAGE TO CORRECT MISTAKE IN SENIOR MORTGAGE: PRIORITY. Where a mortgagee has notice of a first but unrecorded mortgage, which is recited in his mortgage as being a first lien, he cannot claim that his mortgage takes precedence of a new mortgage, executed and recorded after his mortgage, to correct a mistake in the description of the property in the first mortgage. *Council Bluffs Lodge v. Billups*, 674.
8. MORTGAGE FOR MORE THAN DEBT: BADGE OF FRAUD. See Fraud, 3.

See CHATTEL MORTGAGE.

REDEMPTION, 1.

VENDOR AND VENDEE, 1.

MUNICIPAL CORPORATIONS.

See CITIES AND TOWNS.

COUNTY.

NEGLIGENCE.

1. IN CONSTRUCTION OF BUILDING: LIABILITY OF ARCHITECT. See Architect, 1.
2. IN SIGNING CONTRACT WITHOUT READING: CONTRACTOR ESTOPPED. See Contract, 10.
3. IN CROSSING UNSAFE BRIDGE. See County, 1, 2.
4. OF RAILROAD COMPANIES RESULTING IN INJURIES TO EMPLOYEES. See Railroads, *passim*.
5. IN TRANSMITTING TELEGRAMS: MEASURE OF DAMAGES. See Telegraph Companies, 1.

NEGOTIABLE INSTRUMENTS.

See BILL OF LADING.

PROMISSORY NOTE, 2, 3.

NEW TRIAL.

1. NEWLY-DISCOVERED EVIDENCE: INSUFFICIENT SHOWING. The affidavit of defendant's attorney that if a new trial were granted a certain witness who was present and testified at the trial would testify to certain material facts, which the defendant did not know, until after the trial, that the witness would testify to, held insufficient to warrant the granting of a new trial on the ground of newly discovered evidence. *Hand v. Langland*, 185.

2. **NOTICE BY PUBLICATION: MOTION FOR RETRIAL: NOTICE TO PLAINTIFF.**
Where a judgment has been rendered upon notice by publication only, the theory of the statute (Code, § 2877) is that the case remains virtually in court for two years for the purpose of a motion for a retrial, if any defendant shall see fit to make it; and the court has jurisdiction during such time to hear and pass upon such motion without notice thereof to the plaintiff. But the court should in such case, in the exercise of a proper discretion, allow the plaintiff a reasonable opportunity to appear and prepare for trial. *Pollock v. Simpson*, 519.
3. **MOTION FOR: AMENDMENT MORE THAN THREE DAYS AFTER VERDICT: NEWLY-DISCOVERED EVIDENCE.** Section 2838 of the Code does not require that a motion for a new trial on the ground of newly-discovered evidence be filed within three days after verdict, and where a motion on other grounds was duly filed within that time, *held* that an amendment on the ground of newly-discovered evidence might properly be filed later. *Van Horn v. Redmon*, 689.
4. **WHEN ALLOWED ON PROCEDENDO.** See Practice, 4.

NOTARY PUBLIC.

1. **SEAL OF FOREIGN NOTARY: PRESUMPTION AS TO CONTENTS OF.** In the absence of evidence to the contrary, it will be presumed that the laws of another state are similar to those of Iowa, and that they require notaries public to use a seal similar to that required to be used by notaries in this state. *Goodnow v. Litchfield*, 691.
2. **JURISDICTION: PRESUMPTION IN FAVOR OF.** An affidavit bore the caption "State of Iowa, County of Webster," but appeared to have been sworn to before a notary public in Dubuque county. *Held* that it must be presumed, in the absence of other evidence, that the notary took the affidavit within his own county. *Id.*

NOTES AND BILLS.

See PROMISSORY NOTES.

NOTICE.

See MORTGAGE, 5, 7.

PRINCIPAL AND AGENT, 23.

VENDOR AND VENDEE, 1, 2.

ORIGINAL NOTICE.

NUISANCE.

1. **INTOXICATING LIQUORS: INDICTMENT: DUPLICITY.** See Criminal Law, 9.
2. ———: **SALE BY CLERK: INTENTION OF EMPLOYER.** See Intoxicating Liquors, 1,
3. ———: **INJUNCTION.** See Intoxicating Liquors, 4.

OFFICER.

1. **RESISTANCE TO: FACTS NOT WARRANTING.** See Arrest, 1.
2. **ARREST WITHOUT WARRANT: WHEN LAWFUL.** See Arrest, 2.

3. **FORSTALLING DELIBERATE ACTION OF: PUBLIC POLICY.** See School Directors, 2.

See BOARD OF EQUALIZATION.

BOARD OF SUPERVISORS.

CLERK OF COURTS.

GOVERNOR.

SCHOOL DIRECTORS.

TOWNSHIP TRUSTEES.

ORIGINAL NOTICE.

1. **SERVICE BY PUBLICATION: MOTION FOR RETRIAL: PLAINTIFF'S RIGHT TO NOTICE.** See New Trial, 2.
2. **APPEARANCE DAY INSERTED BY OFFICER AT HIS OPTION.** See Statute of Limitations, 1.

PARENT AND CHILD.

See DOMESTIC RELATIONS.

PARTIES TO ACTIONS.

See INTOXICATING LIQUORS, 7.

PARTNERSHIP.

1. **POWER TO SELL FIRM PROPERTY.** One partner does not have the power to sell the entire property of the firm without the knowledge and consent of his partner, who, though absent, might easily be consulted by mail or telegraph, and a sale so made will be set aside in equity where the purchaser knew the facts at the time of purchasing. *Hunter v. Waynick*, 555.
2. **LOAN OF MONEY ON OBLIGATION OF INDIVIDUAL PARTNERS: FIRM LIABILITY.** Where money was borrowed for partnership purposes, but the notes and mortgage upon the firm property, given to secure the loan, were not executed in the firm name, but were signed by all the partners individually, *held* that the debt was a debt of the firm, and that of the mortgage could not, on account of being so executed, be set aside at the instance of subsequent creditors of the firm. *Carson, Pirie, Scott & Co. v. Byers & Eggers*, 606.
3. **ACTS OF CLERK AND PARTNER NOT BINDING ON FIRM.** See Promissory Note, 8.

PAUPERS.

1. **DUTY AND DISCRETION OF TOWNSHIP TRUSTEES IN GRANTING RELIEF: LIABILITY OF COUNTY OF RESIDENCE.** The duty of township trustees, when applied to by poor persons for relief, is not to be determined by very rigid rules. They must, in the exercise of a wise discretion, grant relief where they judge that humanity requires it; and they must often act promptly, and without taking time to make an extensive examination of the applicant's circumstances; and where they act in good faith, and without the abuse of discretion, their action is not subject to review. (*Armstrong v. Tama County*, 34 Iowa, 309.) And so, in this case, where

the trustees of one of the townships of the plaintiff county in good faith granted relief, at the county's expense, to a man and family who had a settlement in the defendant county, *held* that the defendant county could not avoid liability for the same on the ground that the man had not a pauper record at the time of his removal to the plaintiff county, and that he had some property at the time the relief was given. *Har- din Co. v. Wright Co.*, 127.

PERSONAL INJURIES.

See CITIES AND TOWNS, 3, 8.

COUNTY, 1, 2.

EVIDENCE, 3, 4, 5, 17.

HUSBAND AND WIFE, 2.

RAILROADS, *passim*.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE.

DETINUE.

REPLEVIN.

PHARMACIST.

See INTOXICATING LIQUORS, 5, 6.

PLACE OF SUIT.

See VENUE.

PLEADING.

1. CONCLUSION OF LAW: NO OBJECTION: RESULT. The allegation that a certain judgment is a lien on certain property, though a conclusion of law, is sufficient, until objected to, to show *prima facie* the right to enforce the alleged lien. *Hayden v. Goppinger*, 106.
2. VERIFICATION OF PLEADING BY ATTORNEY: COMPETENCY. An attorney for defendant is competent to verify statements in an answer, the truth of which he shows that he has heard the plaintiff admit; but his knowledge that certain other facts pleaded in the answer were adjudicated between the parties in a former trial does not qualify him to verify the statement of such facts. *Searle v. Richardson*, 170.
3. ANSWER: DENIAL OF KNOWLEDGE AND INFORMATION. In an action to quiet title, the plaintiff, in anticipation of a defense of former adjudication, alleged that a pretended decree had been rendered in the district court, quieting the title in defendants as against the plaintiff. This allegation was admitted by the answer. The petition further stated that plaintiff had no notice of the pendency of the action in which said decree was rendered. To this allegation defendants answered that they had no knowledge or information as to whether plaintiff had such notice, except what was shown by the recitals of the decree itself; and upon such knowledge they alleged upon information and belief that plaintiff had such notice. *Held* that plaintiff's allegation that he had no notice was put in issue by the answer. *Leyner v. Fuller*, 188.

4. **DEMURRER TO ANSWER: GOOD AS TO PART BUT BAD AS TO WHOLE: IMPROPERLY SUSTAINED.** The demurrer to the answer in this case, being to the whole answer, which raised issues which should have been submitted to the jury, was improperly sustained. *Chicago, I. & D. R'y Co. v. Cedar Rapids, I. F. & N. W. R'y Co.*, 324.
5. **EVIDENCE.** Only ultimate facts should be pleaded, and the pleading of evidence irrelevant to the real issues does not make such evidence admissible on the trial. *Barbee v. Hamilton*, 417.
6. **EVIDENCE: VARIANCE: STOPPING SPEED OF CARS.** An allegation that a signal was given to "stop the speed" of the cars in question *held* to be supported by evidence of a signal which directed a total cessation of motion,—that being what is meant by stopping the speed. *Beems v. Chicago, R. I. & P. R'y Co.*, 435.
7. **ALLEGATION OF AGENCY.** Action to recover of defendants the benefits of a contract made by them, as agents of plaintiff, with a third party. Upon examination of the original and amended petitions, *held* that the allegations of agency were sufficient to sustain a finding and judgment for plaintiff. *Burrows v. Frank*, 502.
8. **AMENDMENT TO CONFORM PLEADING TO EVIDENCE ENCOURAGED.** The statute, and the practice under it, as shown by the decisions, are very liberal in allowing amendments, and especially where the object is to conform the pleadings to the evidence; and it was error in this case to sustain a motion to strike such amendment from the files, after it had been filed with leave of the court. *Blandon v. Glover*, 615.
9. **SETTING FORTH CHARACTER OF PLAINTIFF AS TRUSTEE OF EXPRESS TRUST.** Where it plainly appeared from the petition that plaintiff sued as the trustee of an express trust, and that he was specially authorized to bring and maintain the suit in his own name, *held* that the petition was sufficiently specific as to that. *Goodnow v. Litchfield*, 691.
10. **FACTS CONSTITUTING FRAUD MUST BE SET OUT.** See Fraud, 1.
11. **IN GARNISHMENT CASES.** See Garnishment, 1.
12. **DEFENSE NOT SUPPLEMENTED BY ALLEGATIONS IN COUNTER-CLAIM.** See Instructions, 4.
13. **IN ACTION TO CANCEL VOID JUDGMENT: NECESSARY ALLEGATIONS.** See Judgment and Decree, 3.
14. **MISJOINDER OF CAUSES: ELECTION.** See Mechanic's Lien, 5.
15. **PLEA OF ESTOPPEL AFTER VERDICT.** See Practice, 3.
16. **INSUFFICIENCY OF PETITION MUST BE FIRST RAISED IN TRIAL COURT.** See Practice in Supreme Court, 17.
17. **CLERICAL ERROR DISCOVERED ON APPEAL: CAUSE REMANDED WITH LEAVE TO CORRECT.** See Practice in Supreme Court, 30.

See MECHANIC'S LIEN, 3.

POOR PERSONS.

See PAUPERS.

POOR TAX.

1. **POWER OF COUNTY TO LEVY.** See County, 3.

POWERS.

1. OF MUNICIPAL CORPORATIONS: HOW EXERCISED. See Cities and Towns, 4.

PRACTICE.

1. EVIDENCE: CONTRADICTING WITNESS AS TO IRRELEVANT MATTERS. A witness cannot be discredited by contradicting his statement as to irrelevant matters. *Eikenberry & Co. v. Edwards*, 14.
2. EXCEPTING TO INSTRUCTIONS GIVEN: WHAT IS SUFFICIENT. Where the charge consisted of fifteen instructions, and at the time when it was given the defendant caused an exception to be entered in the following words: "To the giving of each and every instruction the defendant duly excepts," *held* that defendant, under such exception, was entitled, on appeal to this court, to present his objections to any of the instructions, though he admitted that some of them were correct. *Hawes v. Burlington, C. R. & N. R'y Co.*, 64 Iowa, 315, followed. *Id.*
3. INSTRUCTING AS TO ESTOPPEL WHEN NOT PLEADED: ERROR NOT CURED. In this case no estoppel was pleaded, and certain evidence offered by plaintiffs, and afterwards claimed by them to establish an estoppel, was relevant to the issues as they stood, and was admitted without objection on the part of defendant. Plaintiffs' counsel went outside of the issues and argued to the jury that the defendant was estopped by the evidence referred to, to which defendant's counsel did not object or reply; and the court instructed the jury that if they found certain facts to be established by the evidence the defendant would be estopped. *Held* that it was error so to instruct; that if the evidence tended to prove an estoppel it was not admissible for that purpose, because there was no such issue; that the error was not waived by defendant's failure to object to that evidence when offered, or his failure to object to the argument of counsel on the subject; and that it was not cured by plaintiffs' filing a reply, after verdict, pleading as an estoppel the facts which the evidence tended to prove, because on such issue defendant had not been heard, and could not properly have been heard, on the issues tried. *Id.*
4. MOTION FOR VERDICT ON PLAINTIFF'S EVIDENCE: ADMISSION OF FACTS BY: EFFECT OF: PRACTICE ON PROCEEDENDO. At the conclusion of plaintiff's testimony, defendant moved the court to direct a verdict in its favor. *Held* that by so doing it admitted all the facts which the testimony tended to prove, but that the case was not then in the same position as if the admitted facts had been established by a special finding upon a full submission; because, even though, as the evidence stood, the motion ought to have been sustained, it was clearly within the discretion of the court to permit plaintiff to introduce further testimony, omitted by mistake or inadvertence. And so, where the motion was overruled, and defendant elected to stand on such ruling, and appealed to this court, and the ruling was reversed, and a *proceedendo* in the usual form was issued, *held* that a motion by defendant in the lower court for judgment in its favor, without the introduction of further evidence, was properly overruled. *Meadows v. Hawkeye Ins. Co.*, 57.
5. MISCONDUCT OF COUNSEL IN ADDRESSING JURY: WAIVER OF BY FAILING TO OBJECT AT THE TIME: EXCEPTION. While many irregularities may occur during the trial of a cause, which, unless objected to at the time, should be deemed to be waived, yet, where counsel, in addressing the jury, violates one of the plainest rules of practice to the prejudice of the other party, as was done in this case, (see opinion for facts,) the offending counsel should hardly be heard in this court to say that the misconduct was waived by the failure of opposing counsel to object at the time. *Whitsett v. Chicago, R. I. & P. R'y Co.*, 150.

6. **CHANGING RECORD AT SAME TERM WHEN MADE: NOTICE TO INTERESTED PARTIES NECESSARY TO JURISDICTION: CERTIORARI: CODE, §§ 178, 3216.** A demurrer to a petition was sustained in the district court, and the plaintiffs in the cause electing to stand upon their petition, judgment was entered against them for costs. After the record of such proceeding was made, and approved and signed by the judge, and after counsel for defendant in the cause had left the court, but during the term at which the order and judgment were entered, the court permitted the plaintiffs in the action to withdraw their election to stand on their petition, and, without any application therefor having been filed, or any notice thereof to defendant in the action, entered an order setting aside said judgment, and granting the plaintiffs time to file an amendment to their petition. *Held* that the court had no jurisdiction, under § 178 of the Code, thus to change the record in the absence of, and without notice to, the defendant; and that, since the defendant in that cause had no opportunity to except, and thus lay the foundation for an appeal, *certiorari* would lie to correct the error. Code, § 3216. *Hawkeye Ins. Co. v. Duffie*, 175.
7. **DIRECTING VERDICT: EXAMPLE: FRAUD IN CHATTEL MORTGAGE.** The court is justified in directing the verdict of the jury where there is an entire absence of evidence tending to establish the cause of action or defense alleged in the pleadings. (*Sperry v. Etheridge*, 63 Iowa, 543.) And so, where the issue related to the validity of a chattel mortgage, while there may have been some evidence of a fraudulent intent on the part of the mortgagor, yet, since there was an entire absence of evidence of such intent on the part of the mortgagee, the court was justified in directing the verdict of the jury on that point. *Citizens' Bank v. Rhutzel*, 316.
8. **CORRECTION OF RECORD AFTER TERM ON CONFLICTING AFFIDAVITS: DISCRETION OF TRIAL COURT.** It is doubtful whether a court should correct its record, after the adjournment of the term, upon affidavits, unaided by anything in the record or in the recollection of the judge which tends to corroborate the affidavits; but a refusal in such case to make the correction sought, where the affidavits are conflicting, will not be reversed on appeal. It is doubtful, indeed, whether this court ought ever to interfere in such cases, unless there is record evidence which shows that there is a mistake in the record which justice requires should be corrected. *State v. Crosby*, 352.
9. **ALLOWING REPORTER TO READ NOTES OF EVIDENCE TO JURY.** In this case, after the jury had retired for deliberation, the short-hand reporter, under order of the court, but in the absence of the court and counsel, and without the knowledge of appellant or its counsel, went into the jury room and read from his notes such portions of the evidence as the jury called for. *Held* that the proceeding was without warrant, and that on account of the irregularity a new trial should have been granted on defendant's motion. *Fleming v. Town of Shenandoah*, 505.
10. **DETERMINATION OF ATTORNEY'S FEES.** See *Attorney's Fees*, 1.
11. **TRIAL OF CRIMINAL CASE WITHOUT PLEA.** See *Criminal Law*, 1.
12. **TRIAL WITHOUT READING INDICTMENT, OR MAKING OPENING STATEMENT.** See *Criminal Law*, 22.
13. **USE OF DEPOSITION IN OTHER CAUSE BETWEEN SAME PARTIES.** See *Deposition*, 1.
14. **IN ACTION TO RECOVER CHATTELS.** See *Detinue*, 1, 2.
15. **ACTION FOR PERSONAL INJURY: EXHIBITION OF WOUNDS TO JURY.** See *Evidence*, 3.

16. ORDER OF INTRODUCING EVIDENCE. See Evidence, 7.
17. READING PART OF DEPOSITION TAKEN BUT NOT USED BY ADVERSARY. See Evidence, 13.
18. MISJOINER OF CAUSES. See Mechanic's Lien, 5.
See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2.

PRACTICE IN SUPREME COURT.

1. DISMISSING APPEAL ON CONFLICTING AFFIDAVITS. Where the affidavits relating to the grounds on which the dismissal of an appeal is asked are conflicting, the dismissal will not be granted. *Long v. Smith*, 22.
2. ERROR IN KIND OF PROCEEDINGS DISREGARDED. Although this action should have been begun below as an action to redeem from a tax sale instead of an action to quiet title, yet, as no objection was made to the form of the action, it is treated and disposed of in this court according to its real nature and merits,—that is, as an action to redeem. *Id.*
3. CAUSE CONSIDERED AS PRESENTED BY COUNSEL. Although the record does not necessarily show that a certain question in a case was raised below, yet, when the counsel agree in presenting the cause here as if such question were properly before the court, it will be so considered. *Wise v. Rothschild Bros.*, 84.
4. CONFLICTING EVIDENCE TO SUSTAIN FINDING OF COURT. This court will not interfere with the finding of a court or jury upon a question of facts where the finding is based upon conflicting evidence. *Hughes v. Sweeney*, 93.
5. COSTS OF UNNECESSARY ABSTRACT. Where the record was fully and fairly presented by appellant's abstract, the costs made in preparing a useless amendment thereto by the appellee were taxed to him, though the judgment in his favor was affirmed. *Johnson v. Shank*, 115.
6. REVIEWING RULINGS ON CHALLENGES TO JURORS: PRINCIPLES STATED. When the trial court, by its ruling upon a challenge, compels a party to submit his cause to a juror who is prejudiced against him, he has good ground for complaint. But when the court sustains a challenge, and the adverse party goes to trial with a jury formed without his exhausting the peremptory challenges allowed him by the law, this court ought to be well satisfied that the challenge was sustained without any cause, in order to justify a reversal on that ground; and the record in this case (see opinion) does not show that the challenge complained of may not have been sustained for a sufficient cause. *Wisehart v. Dietz*, 121.
7. ERRORS NOT ASSIGNED NOT CONSIDERED. *Hand v. Langland*, 185.
8. CONFLICTING EVIDENCE TO SUPPORT VERDICT. This court will not interfere with the finding of a jury when there is a conflict in the evidence. *Mazon v. Chicago, M. & St. P. R'y Co.*, 226.
9. INSTRUCTIONS NOT DULY EXCEPTED TO NOT REVIEWED. This court will not review rulings upon instructions which are not excepted to either at the trial, or within three days after the verdict. Code, § 2789. *Id.*
10. COSTS OF BRINGING UP INCOMPETENT EVIDENCE TAXED TO PARTIES INTRODUCING IT. Although defendants prevail on the appeal of this case, still, as plaintiff was obliged, in presenting her appeal, to bring up a large amount of incompetent testimony which defendants had taken, a proportionate share of the costs is taxed to defendants. *Samson v. Samson*, 253.

11. **PRESUMPTION IN FAVOR OF TRIAL COURT.** It will be presumed that the judgment of the trial court in allowing attorneys fees was based upon proper evidence in relation thereto, unless the contrary affirmatively appears from the record. *Kelso v. Fitzgerald*, 266.
12. **ABSTRACT DENIED: WHEN TRANSCRIPT NOT CONSULTED.** Where a case must be affirmed upon the showing made by appellant's abstract, there is no occasion to examine the transcript to see whether or not the abstract is correct, even though appellee denies its correctness. *Id.*
13. **CONFLICT OF ABSTRACTS: WHEN DISREGARDED.** When a cause must be affirmed on such portions of the abstract as are not denied, the court has no occasion to resort to the transcript to settle disputed points in the record. *Horton v. Ambrosen*, 270.
14. **JUDGMENT TOO GREAT: REMITTITUR: COSTS.** Where a judgment appealed from is erroneous only in being for too large a sum, but the appellee admits the excess and offers to remit it, the judgment will be modified and affirmed, but the appellee must pay the costs of the appeal. *Gere v. Council Bluffs Ins. Co.*, 272.
15. **ASSIGNMENT OF ERRORS: TIME OF FILING.** An assignment of errors not filed ten days before the first day of the term, and not until after appellee's argument is filed, cannot be considered. Code, § 3182; *Betts v. City of Glenwood*, 52 Iowa, 124. *Russell & Co. v. Johnston*, 279.
16. **ARGUMENT: STATEMENTS OUTSIDE OF RECORD: DISTRICT JUDGE ASSAILED: COUNSEL CENSURED.** One of the counsel in this cause is censured for making in his argument in this court a statement of alleged facts, outside of the record, and claiming that they impeach the judicial conduct of the district judge who tried the case below. *Paine v. Frost*, 282.
17. **INSUFFICIENCY OF PETITION: OBJECTION TOO LATE.** An objection that the petition is not sufficient to sustain the verdict cannot be urged for the first time in this court. *Eshelman v. Chicago, R. I. & P. R'y Co.*, 236.
18. **TRIAL DE NOVO: EVIDENCE: ABSTRACT.** It is not usually necessary or desirable that an abstract contain in fact all the evidence, in order to a trial *de novo*, but only such as is necessary to a proper understanding of the facts of the case, and when the abstract purports to contain all the evidence, it will be presumed to be true for the purposes of the case, except so far as additional evidence is set out by the appellee. *Huff v. Farnell*, 298.
19. **PRESUMPTION IN FAVOR OF TRIAL COURT.** Where the record does not affirmatively show that the ruling of the trial court was wrong, it will be presumed to have been right. *Citizens' Bank v. Rhutaset*, 316.
20. **DISCRETION OF TRIAL COURT IN ALLOWING AMENDMENT NOT INTERFERED WITH.** This court does not interfere with the discretion of trial courts in allowing amendments within the time fixed by statute. Accordingly, an order allowing an amendment to the answer, in the nature of a cross-petition, in this case, when it was called for trial, will not be reviewed. *Murling v. Burlington, C. R. & N. R'y Co.*, 331.
21. **AMENDED ABSTRACT.** Where appellee files an amended abstract, it will be taken as true, unless denied by appellant. *Kent v. Coquillard*, 503.
22. **PRESUMPTION IN FAVOR OF TRIAL COURT.** Where the record as presented to this court shows that the trial court found that appellant was duly and legally served with process, it must be presumed, in the absence of a showing to the contrary, that such finding was based on sufficient evidence. *Id.*

23. **TRIAL DE NOVO: EVIDENCE WANTING.** A trial *de novo* cannot be had where it is not shown by the abstract that the evidence was ever certified by the trial judge, and it is in no way made to appear that all the evidence is contained in the abstract. *Boyle v. Mallett*, 516.
24. **INSUFFICIENT RECORD: JUDGMENT AFFIRMED.** A reversal cannot be had for alleged error in refusing a change of venue in a criminal case, when the record fails to show the grounds on which the change was asked. *State v. Ball*, 517.
25. **VERDICT: EVIDENCE TO SUPPORT.** There being some evidence to support the verdict, it will not be disturbed in this court, *Gunsel v. McDonnell*, 521.
26. **CRIMINAL CASE: APPELLANT'S ABSTRACT ILLEGIBLE: CAUSE REVIEWED ON ABSTRACT OF ATTORNEY-GENERAL.** Defendant had leave to present his appeal in writing, but his abstract was almost illegible, and was otherwise defective. The attorney-general filed a complete abstract of the record, which was not denied, and the appeal was disposed of on this abstract. *State v. Peterson*, 564.
27. **CONFLICTING EVIDENCE: VERDICT NOT DISTURBED.** Since the evidence was conflicting as to the amount of plaintiff's damages, the verdict cannot be disturbed on appeal on the ground that the award was excessive. *McClean v. Chicago, I. & D. R'y Co.*, 563.
28. **EFFECT OF MERE DENIAL OF APPELLANT'S ABSTRACT, NO TRANSCRIPT BEING FILED.** Appellant's abstract in this case stated that it contained "all the evidence introduced, and all offers of evidence made, on the trial, together with all the objections made and exceptions taken by counsel, and all rulings of the court upon said trial, and the entire record in said cause," and the abstract on its face appeared to be what it claimed to be. Appellee filed an abstract stating that appellant's abstract was not correct; that it did not contain all the evidence in a condensed or other form; that it did not contain over one-third of the evidence taken on the trial, and that what it did contain was disconnected from the order in which it was introduced. But no transcript was filed from which this court could determine the questions thus raised. *Held* that under such circumstances appellant's abstract must be taken as true, and the cause reversed for errors appearing therein. *Allen v. Bryson*, 591.
29. **EVIDENCE NOT OBJECTED TO BELOW.** Objections to evidence cannot be raised for the first time on appeal to this court. *Id.*
30. **EQUITY CASE: EVIDENT MISTAKE IN PLEADING: CAUSE REVERSED AND REMANDED WITH LEAVE TO AMEND.** Ordinarily this court has no power to remand an equity case triable *de novo* but must try and determine it on the record presented; but there are exceptions to the rule, and it has been held that the power to remand exists when it is necessary for the purpose of effectuating justice. (See cases cited.) And in this case, where there was an evident mistake in the pleadings, which was not discovered until after the appeal, on account of which a judgment rendered upon the record would be unjust, *held* that the cause should be remanded with leave to the parties to replead, and to introduce such further evidence as they might desire. *White v. Farlie*, 623.
31. **REPORT OF REFEREE: EVIDENCE TO SUPPORT.** The report of a referee, like the verdict of a jury, will not be disturbed on appeal when there is any evidence which tends to support it. *Bratnard v. Simmons*, 646.
32. **ERRORS NOT ARGUED NOT CONSIDERED.** Errors, though assigned, will not be considered unless urged in argument. *Goodnow v. Wells*, 654.

33. **CHANGE OF VENUE: OBJECTION FOR FIRST TIME ON APPEAL.** As the abstract does not show that any objection was made below to the change of venue here complained of, such complaint cannot now be considered. *Goodnow v. Plumb*, 661.
34. **EVIDENCE: INADMISSIBLE UNDER ISSUES: OBJECTION TOO LATE ON APPEAL.** Where evidence which is material to the real controversy between the parties, but which is not admissible under the issues as made by the pleadings, is admitted without objection in the lower court, it cannot be objected to for the first time in this court. *Council Bluffs Lodge v. Billups*, 674.
35. **RELIANCE ON DEFENSE NOT PLEADED: OBJECTION TOO LATE ON APPEAL.** An objection that a defense relied on was not pleaded cannot be raised for the first time in this court. *Byers v. Harris*, 685.
36. **PRESUMPTION AS TO EVIDENCE ON MOTION FOR CHANGE OF VENUE.** In the absence of a contrary showing, it will be presumed that the court below acted upon sufficient evidence in allowing a change of venue; and, though no such evidence is found in an abstract purporting to contain all the evidence, yet such presumption will be entertained, for the abstract must be supposed to refer only to the evidence taken on the trial subsequent to the change of venue. *Goodnow v. Litchfield*, 691.
37. **CONSIDERATION OF QUESTIONS NOT LIMITED BY REASONING OF COUNSEL.** Where questions are properly brought to the notice of this court, the court's consideration of them is not limited to the reasons urged by counsel in argument; and if objections properly arising seem to the court to be well taken they will be sustained, even though the reasons urged by counsel in support of them must be discarded, and sound reasons substituted. *Bond v. Wabash, St. L. & P. R'y Co.*, 712.
38. **THE THEORY OF A CAUSE MUST BE ADHERED TO.** The theory of a cause cannot be changed on appeal; and where an action for treble damages was brought under one statute, the right to recover actual damages under another statute cannot be considered on appeal. *Id.*
39. **CAUSE NOT DIVIDED.** Where a judgment in a law action is based on several independant counts, and it is found erroneous as to some of the counts, it will not be affirmed as to part and reversed as to part, but the case as a whole will be reversed and remanded. *Id.*
40. **CONSTITUTIONAL QUESTIONS CONSIDERED WITH RELUCTANCE.** This court will not consider constitutional questions unless it is necessary for the disposition of the case. *Id.*
41. **STRIKING OUT AMENDED ABSTRACT.** An amended abstract filed by appellant, made necessary on account of a change of the record in the trial court upon appellee's motion, cannot be stricken out, even though no service thereof was made on appellee. *Peterson v. Adamson*, 739.
42. **OBJECTION TO KIND OF PROCEEDINGS: TOO LATE ON APPEAL.** See Administrator, 2.
43. **ERROR WITHOUT PREJUDICE: NO REVERSAL.** See Criminal Law, 1, 4; Evidence, 18; Instructions, 10.
44. **ERRORS MUST APPEAR OF RECORD.** See Criminal Law, 18; Evidence, 25.
45. **DISCRETION OF TRIAL COURT RESPECTED.** See Practice, 8.

See APPEAL TO SUPREME COURT.

ASSIGNMENT OF ERRORS.

PRESCRIPTION.

1. LOSS BY CITY OF STREET BY NON-USER. See Cities and Towns, 2.

PRINCIPAL AND AGENT.

1. RATIFICATION: INSTRUCTION. An instruction given in this case (see opinion) considered and *held* to have been given with the intention of presenting the question of estoppel, and not of ratification; or, if designated to present the question of ratification, it is erroneous, because it omits some of the essential elements of ratification, and takes from the jury the determination of defendant's purpose and meaning in the acts relied upon as constituting a ratification. *Eikenberry v. Edwards*, 14.
2. NOTICE TO AGENT: HOW FAR BINDING ON PRINCIPAL. A principal is not bound by his agent's knowledge of facts learned a year prior to the agency, in a transaction which the agent was conducting on his own account, unless it is shown that such knowledge was present in the agent's mind at the time of the transaction for his principal. *Yerger v. Barz*, 56 Iowa, 76, followed. *Lunt v. Neeley*, 97.
3. PRINCIPAL BOUND BY AGENT'S KNOWLEDGE: EXAMPLE. Where plaintiff purchased, through his agent, a note and mortgage, and the agent at the time knew that the holder of the mortgage had, for a valuable consideration, agreed to release a portion of the mortgaged premises from the operation of the mortgage, *held* that the principal was bound by his agent's knowledge, and took the mortgage subject to such agreement. *Huff v. Farwell*, 293.
4. ACTION FOR SERVICES: COUNTER-CLAIM FOR MONEY RECEIVED AND NOT ACCOUNTED FOR: BURDEN OF PROOF. Plaintiff sued for a balance of his salary as defendant's pay-master. Defendant set up a counter-claim for \$100, which, it alleged, plaintiff had received, with other money, for disbursement, and had not accounted for. Plaintiff's defense was that, if the money came into his hands, it was lost through no negligence on his part. *Held* that the burden of proof, under the issues, was upon plaintiff to establish his defense, and not upon defendant to negative it; and, there being some evidence, at least, that plaintiff received the money in question, an instruction asked, expressing the doctrine above announced, should have been given. *Becket v. Iowa Improvement Co.*, 337.
5. POWER OF AGENT TO BIND PRINCIPAL LIMITED TO BUSINESS IN HAND: EXAMPLE. Where the business about which an agent was employed related solely to the examination and repair of a machine which his principals had sold to defendant, under an agreement that if they failed to make it do good work, they would replace it with a new machine, *held* that the agent could not bind his principals by directing a different disposition of the machine, upon its failure, from that provided for in the contract, nor by his statement that they were unable to furnish a new machine. *Davis' Sons v. Robinson*, 355.
6. PRINCIPAL AFFECTED BY AGENTS' FRAUD. A party can have no benefit from fraud practiced by his agent on his behalf. *Butler v. Barkley*, 491.
7. SALE OF LAND: EXCESS OF AUTHORITY: SPECIFIC PERFORMANCE. The evidence in this case (see opinion) shows that the agent with whom plaintiff dealt in the purchase of the land in question was a special agent, whose limited authority was known to plaintiff, and that the contract was in excess of such authority. *Held* that the principal was not bound by the contract, and that specific performance could not be decreed. *Siebold v. Davis*, 560.

8. SALE OF LAND ON COMMISSION: DUTY OF PRINCIPAL TO MAKE CLEAR TITLE. See Contract, 8.

See AGENCY AND AGENT.

PROMISSORY NOTE, 1.

PRINCIPAL AND SURETY.

1. ACTION AGAINST: RIGHT TO PLEAD CLAIM OF PRINCIPAL ALONE AS COUNTER-CLAIM. A surety may set up any defense that would be available to his principal, and so the principal and surety, when sued on their obligation, may set up as a counter-claim any demand which the principal, if sued alone, might plead as a counter-claim. Section 2659 of the Code does not apply to such a case. *Reeves v. Chambers*, 81.

See SURETY.

PRIORITY OF RIGHTS.

1. BETWEEN CREDITORS OF INSOLVENTS: JURISDICTION. See Assignment for Benefit of Creditors, 2.
2. BETWEEN ATTACHING CREDITOR AND ADMINISTRATOR. See Attachment, 2.
3. AS BETWEEN PLEDGEE AND MORTGAGEE OF CHATTELS. See Chattle Mortgage, 4.
4. AS BETWEEN ALLOWANCE TO WIDOW AND CLAIM OF CREDITOR. See Estates of Decedents, 2.
5. AS BETWEEN EQUITY OF GRANTORS AND ATTACHMENT AGAINST GRANTEE. See Vendor and Vendee, 1.

See MORTGAGE, 3, 4, 7.

PROMISSORY NOTE.

1. DEPOSIT TO PAY: DEPOSIT STOLEN: AGENCY OF DEPOSITARY: WHO TO BEAR LOSS. Plaintiff's place of business was at A., but it held defendant's note payable at the town of I., but the person or place in I. to whom or at which payment was to be made was not designated. Defendant left enough of money to pay the note with one M. at I., and notified plaintiff thereof, whereupon plaintiff wrote to M. to bring or send the money to A. But the money was afterwards stolen from M.'s house. *Held* that the deposit with M. was not a payment of the note, and did not stop the accumulation of interest; that M. was in no sense the agent of plaintiff, and that the facts stated were no defense to an action on the note. *First Nat. Bank of Albia v. Free*, 11.
2. GUARANTOR: WHO IS: DEFENSE OF USURY BY. One who writes on the back of a note, "I hereby indorse the within note," and signs his name, is a guarantor, under section 2089 of the Code, the same as if he had indorsed in blank, and as guarantor he may set up as a defense to an action on the note usury in its inception. See authorities cited in opinion. *Conger & Michael v. Babbet*, 13.
3. COMBINED WITH CHATTEL MORTGAGE: NEGOTIABILITY. Where a promissory note, negotiable in itself, was given in the purchase of a certain chattel, and coupled with the note, in the same instrument, was a mortgage upon the chattel to secure the note, and under the mortgage, as properly construed, (see chattel mortgage, 5,) the mortgagee was entitled to take possession of the chattel whenever he might feel insecure,

but not to sell it in payment, or part payment, of the note until after the maturity of the note, *held* that the instrument was negotiable, since the debt evidenced thereby was not subject to be diminished before its maturity. *Smith v. Marland*, 59 Iowa, 654, distinguished. *Bank of Carroll v. Taylor*, 572.

4. **INTEREST: WHETHER PAYABLE ANNUALLY OR NOT: CONSTRUCTION.** The notes declared on bore interest at the rate of seven per cent per annum, and each contained the following clause: "If interest thereon is not promptly paid annually, the same becomes a part of the principal, and shall bear the same rate of interest." *Held* that it was optional with the maker whether he would pay the interest annually or not, and that no action on the notes could be maintained until the principal was due. *Wood v. Whisler*, 676.
5. **EXTENSION OF TIME: RELEASE OF SURETY.** A promise made by the holder of a note to the principal maker, without any consideration to support it, to extend the time of payment for one year, is not a contract binding upon the holder, and will not operate to discharge a surety who does not consent to the extension of time. *Byers v. Harris*, 685.
6. **PURPOSE FOR WHICH GIVEN: LANGUAGE OF AIDED BY LANGUAGE OF COLLATERAL MORTGAGE.** A writing on the back of a note purported to state the extent of the makers' liability, but a reformation of the writing was sought in order to make it show the real agreement of the parties. *Held* that the recitations of certain mortgages subsequently executed by the same makers to secure the note were properly considered in arriving at the intention of the parties. *Commercial Exchange Bank v. McLeod*, 718.
7. **SIGNATURE DENIED: BURDEN OF PROOF.** Where the signature to the note sued on was denied under oath the burden was on plaintiff to establish that it was genuine. Code, § 2730. *Miller v. House & Laub*, 737.
8. **FIRM NAME SIGNED BY CLERK: AUTHORITY: EVIDENCE: CONDUCT OF PARTNER.** The note sued on was payable by the firm to one of the partners, and the payee indorsed it to plaintiff's intestate; but it was shown that the firm name was signed to the note by the clerk whose general authority did not extend to signing notes for the firm. *Held* that the acceptance and indorsement of the note by the partner did not prove that the note was signed by authority of the firm. His acts of acceptance and indorsement, having been in his own behalf only, were not binding upon the firm. *Id.*
9. **DELIVERY BY CUSTODIAN TO MAKER WITHOUT PAYMENT: WHO LIABLE TO OWNER.** See Estates of Decedents, 4.

PUBLIC LANDS.

1. **DES MOINES RIVER GRANT: WHEN LANDS BECAME TAXABLE: REVISION OF 1860, § 711.** Lands acquired from the state of Iowa under the Des Moines river grant became taxable the year after the purchase thereof from the state, under § 711 of the Revision of 1860, regardless of the date when the land was confirmed to the state by act of congress. Such confirmation related back to the date of the purchase from the state, and inured to the benefit of the purchaser. See cases cited in opinion. *Goodnow v. Wells*, 654; *Goodnow v. Litchfield*, 691.

PUBLIC POLICY.

1. **CONTRACTS IN RESTRAINT OF TRADE.** See Contract, 6.
2. **FORESTALLING ACTION OF PUBLIC OFFICERS.** See School Directors, 2.

PUNISHMENT.

1. ON SECOND CONVICTION AFTER APPEAL. See Criminal Law, 11.
2. FOR LARCENY. See Criminal Law, 21.

QUESTIONS OF LAW AND FACT.

See CHATTEL MORTGAGE, 2.

COUNTY, 2.

RAILROADS, 8, 19.

QUITCLAIM DEED.

1. GRANTEE IN CHARGE WITH NOTICE OF EQUITIES. See Innocent Purchaser, 2.

RAILROADS.

1. EMPLOYEE IN COAL-HOUSE: INJURY BY NEGLIGENCE OF CO-EMPLOYEE: COMPANY NOT LIABLE. One employed in a railroad coal-house, and injured by the negligence of a co-employee while loading coal upon a car, cannot recover of the company, because the injury in such case is not in any manner connected with the use and operation of the railroad. *Foley v. Chicago, R. I. & P. R'y Co.*, 64 Iowa, 614, and *Malone v. Burlington, C. R. & N. R'y Co.*, 61 Id., 326, and 65 Id., 417, followed. *Luce v. Chicago, St. P., M. & O. R'y Co.*, 75.
2. INJURY TO EMPLOYEE BY EXPOSURE TO COLD: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE. Plaintiff, under a "section boss," went on a hand car, with the "boss" and another man, on a very cold morning, to work on a distant part of the road. Plaintiff twice remarked that he believed his feet were freezing, and requested that the car be stopped and he be allowed to walk, but the requests were not made with that degree of earnestness and urgency with which men usually make known their wants when their personal safety depends on the thing wanted; and so the car was not stopped, though plaintiff had it in his power to stop it by the use of the brakes, and it would not have been an act of insubordination for him to do so. Besides, plaintiff might have availed himself of shelter and a fire after their arrival at their destination, but he did not do so, but proceeded to shovel snow till about 2 o'clock p. m., when he said that his feet were frozen, and he was taken home. By the freezing of his feet he was permanently injured. Held that the "boss" was not guilty of negligence for which the company was liable, but that plaintiff was guilty of contributory negligence, and could not recover. *Farmer v. Cent. Iowa R'y Co.*, 136.
3. TAX IN AID OF: FORFEITURE BY ALIENATION OF ROAD INJUNCTION. *Manning v. Mathews*, 66 Iowa, 675, followed. *Mathews v. Winchell*, 149; *Drennan v. Graham*, 161.
4. PERSONAL INJURY TO BRAKEMAN: CONTRIBUTORY NEGLIGENCE: EVIDENCE OF CUSTOM. In an action by a brakeman for a personal injury caused by the negligence of defendant's engineer, it was competent for plaintiff, in order to show that he was not guilty of contributory negligence, to prove that, in performing the duty in which he was engaged when he received the injury, he adopted the course usually pursued under the same circumstances by men in that calling, though in the employment of other companies. *Jeffrey v. Keokuk & D. M. R'y Co.*, 56 Iowa, 546, followed. *Whitsett v. Chicago, R. I. & P. R'y Co.*, 150.

5. ———: ———: OPINION OF WITNESS. In such case it is not competent for a witness, though himself a brakeman, to state that if he had been in plaintiff's place he would have done as plaintiff did. *Id.*
6. ———: OPINION OF BRAKEMAN AS TO EFFECT OF TURNING ON STEAM. One shown to have experience as a brakeman is competent to testify as to the effect produced upon a train of cars by the sudden turning on of steam after the speed of the train has been checked by the brakes. *Id.*
7. INJURY TO BRAKEMAN: PRESUMPTION OF CARE FROM NATURAL INSTINCTS: WHEN IT DOES NOT OBTAIN. The instinct of self-preservation may, in the absence of direct evidence, be allowed some weight as raising an inference of care on the part of one incurring danger; but when the facts of the transaction are proved by direct testimony, the fact of care, or the want of it, is to be determined from those facts, and there is no room for mere presumption. *Way v. Illinois Cent. R'y Co.*, 40 Iowa, 345, distinguished. *Dunlavy v. Chicago, R. I. & P. R'y Co.*, 66 Iowa, 435, followed. *Id.*
8. ———: CONTRIBUTORY NEGLIGENCE: QUESTION OF LAW OR FACT: RULE STATED. Where the facts bearing on the question of contributory negligence are such that but one conclusion can reasonably be drawn from them, it is the province of the court to determine that conclusion. But if from the facts different minds might reasonably reach different conclusions, the parties are entitled to have the question submitted to a jury; and in this case *held* that the question was properly so submitted. See opinion for facts and authorities. *Id.*
9. TAXATION OF: CODE, 1917: CONSTITUTIONALITY: UNIFORM OPERATION OF LAWS. Section 1317 of the Code, providing for the assessment of railroads every year, while real estate is assessed only every alternate year, *held* not repugnant to article 1, § 6, of the constitution of Iowa, nor to the fourteenth amendment to the constitution of the United States, as discriminating against railroads. *Cent. Iowa R'y Co. v. Board of Supervisors*, 199.
10. CONDEMNATION OF RIGHT OF WAY: APPEAL: VIEW BY JURY: DISCRETION OF COURT. Section 2790 of the Code leaves it to the discretion of the trial court whether or not the jury shall view the premises in controversy, and this court cannot interfere with the exercise of such discretion. So *held* in this case,—an appeal from an award by commissioners of damages for right of way for a railroad. *Clayton v. Chicago, I. & D. R'y Co.*, 238.
11. RIGHT OF WAY: INSTRUCTION: EASEMENT. While the right of way for a railroad condemned under the statute is an easement, and the fee remains in the owner of the land condemned, yet it is not proper so to instruct a jury in an appeal from condemnation proceedings, unless it is made to appear that the fee, burdened with the easement, is of some determinative value to the owner, which is not ordinarily the case. *Cummings v. Des Moines & St. Louis R'y Co.*, 63 Iowa, 397, and *Hollingsworth v. Same*, *Id.*, 443, followed. *Id.*
12. ———: RIGHT OF OWNER TO CROSS: INSTRUCTION. An instruction which assumes that the owner of land condemned for right of way for a railroad has a right to cross and recross it, superior to the right of the company to use it for railway purposes, is erroneous, and was properly refused in this case. *Id.*
13. CATTLE-GUARDS: WHERE THEY MUST BE MAINTAINED: CODE, § 1298. Under the provisions of Code, § 1298, a railroad company must maintain a cattle-guard wherever its road enters or leaves "fenced land,"

whether the fenced land be the land of another or its own right of way. *Robinson v. Chicago, R. I. & P. R'y Co.*, 292.

14. CONDEMNATION OF RIGHT OF WAY: PAPERS LOST: OTHER EVIDENCE. The condemnation papers for the right of way in question being lost, the facts of condemnation and the payment of the award to the plaintiff were sufficiently established for the purposes of the case by other evidence. See opinion. *Marling v. Burlington, C. R. & N. R'y Co.*, 331.
15. —: EVIDENCE OF SUCCESSION TO RIGHTS OF CONDEMNING COMPANY. Where it was shown by parol that the condemning company had changed its name, and that the defendant held under a conveyance from one who purchased the right of way at a foreclosure sale in an action brought against the condemning company, in its new name, *held* that this was sufficient evidence that defendant had succeeded to the rights of the condemning company, especially where there was no adverse claim made by the condemning company or any one claiming under it. *Id.*
16. —: NON-USER: STATUTE OF LIMITATIONS: ESTOPPEL. The evidence (see opinion) fails to establish plaintiff's claim that the right of way in question had been abandoned for more than ten years; and, besides, he is precluded from insisting upon such abandonment by his agreement, made with defendant's lessee, whereby said lessee constructed, and has ever since maintained, the very road of which he now complains. *Id.*
17. INJURY TO CAR-COUPLER: DUTY OF FIREMAN TO AVERT DANGER AFTER ITS DISCOVERY: INSTRUCTION. Plaintiff's intestate died of an injury received while attempting to couple cars on defendant's road. Plaintiff seeks to recover on the ground that defendant's employees were negligent in moving the cars with too much speed. The court instructed the jury, in substance, that if the speed of the train was uncommon, and the danger unusual, and the speed was such as to indicate a strong probability that decedent would get hurt when he went between the cars, then it was the duty of the fireman to do whatever he could, by reasonable promptness, to avert the accident after he saw the decedent go into the position of danger. *Held* that the instruction was correct. *Beems v. Chicago, R. I. & P. R'y Co.*, 435.
18. —: EVIDENCE: RULES OF COMPANY. Certain rules of the defendant company regarding the duty of train-men in the management of trains construed, and *held* to have been properly admitted in evidence in this case on behalf of plaintiff. *Id.*
19. USUAL SPEED OF TRAINS: QUESTION FOR JURY. Whether the speed of the train in question was usual and proper under the circumstances was for the jury to determine from the evidence. *Id.*
20. DEATH OF EMPLOYEE THROUGH COMPANY'S NEGLIGENCE: EVIDENCE OF DAMAGES: LIFE TABLES. Where the evidence showed that the deceased, who came to his death through defendant's negligence, was twenty-five years of age, and that he was an active, industrious man, in good health, with a common education, and that at the time of his death he was earning from \$40 to \$45 per month, these facts were sufficient to authorize an award of substantial damages, without the introduction of life-tables to show the probable duration of decedent's life, had he not been killed; and, in the absence of a claim that the amount awarded was excessive, the verdict should not be disturbed. *Id.*
21. OCCUPATION OF ALLEY. DIMINUTION OF RENTAL VALUE OF PROPERTY: EVIDENCE. Where the question related to the diminution of the rental

value of town property by reason of the construction and operation of a railway over and along an adjacent alley, *held* that it was proper to show how the occupants of the property were annoyed by the noise, escape of fire from engines, etc., by the operation of the road. *Wilson v. Des Moines, O. & S. R'y Co.*, 509.

22. ———: ACTION BY ABUTTING LOT OWNER: SUBSEQUENT ASSESSMENT OF DAMAGES ON COMPANY'S MOTION NO BAR TO ACTION: EVIDENCE. Defendant built its road along an alley adjacent to plaintiff's town property, without first compensating plaintiff for his damages, as required by § 464 of the Code. Plaintiff brought this action to recover his damages. Defendant pleaded, as in bar of the further prosecution of the action, that subsequent to the beginning of the action it caused plaintiff's damages to be ascertained, in the manner provided by law, and that such assessment was made as of the time when the road was constructed in the alley, and interest was computed thereon up to the date of assessment, and that plaintiff had appealed from the award. Evidence offered in support of this defense was excluded upon plaintiff's objection. *Held* that it was rightly excluded, because there was no warrant in law for the assessment of plaintiff's damages suffered prior to the date of the assessment, and that the plea was no defense to the action as to such damages. *Id.*
23. DAMAGES FOR RIGHT OF WAY: EVIDENCE ON APPEAL FROM AWARD: OPINION OF OWNER AS TO USE OF PROPERTY. Where the owner of land taken for railway purposes had testified to the value of the tract before and after the right of way had been appropriated, it was proper to allow him to show the basis of his estimate by testifying further that the property, before the appropriation, was adapted to residence purposes, but that it was not so adapted afterwards. *McClean v. Chicago, I. & D. R'y Co.*, 563.
24. ———: ROAD-BED PARTLY IN STREET AND PARTLY ON PLAINTIFF'S LAND. Where the bed of defendant's railway was partly on plaintiff's land, and partly on the city street adjacent to the land, plaintiff was entitled, in the proceeding to assess his damages, to be compensated not only for the appropriation of the portion of his land taken for the right of way, but also for the injury he would sustain on account of the laying down of the railroad track in the street on which his property abutted—under Code, § 464. *Id.*
25. EXTORTION AND UNJUST DISCRIMINATION: PENALTY: STATUTE STRICTLY CONSTRUED: § 13, CHAP. 77, LAWS OF 1878. Section 13, Chapter 77, Laws of 1878, providing a penalty for the violation of any of the provisions of said act "as to extortion or unjust discrimination," is, like all other penal statutes, to be strictly construed, and must be limited to extortion and discrimination in making charges; and the penalty of treble damages cannot be recovered for a failure or refusal to furnish cars or transportation, as required by § 10 of the act. *Bond v. Wabash, St. L. & P. R'y Co.*, 712.
26. TAXATION IN AID OF: CONSTITUTIONALITY OF STATUTES: CHAP. 123, LAWS OF 1876, AS AMENDED BY CHAP. 173, LAWS OF 1878. Chapter 123, Laws of 1876, as amended by chapter 173, Laws of 1878, providing for the taxation of cities, towns and townships to aid in the construction of railroads, *held* to be constitutional, on the authority of the former decisions of this court. See cases cited in opinion. *Chicago, M. & St. P. R'y Co. v. Shea*, 728.
27. ———: CERTIFICATE OF TOWNSHIP CLERK TO COUNTY AUDITOR: FORM OF: WHAT IS SUFFICIENT. Where a tax was voted by a township in aid of a railroad, under chapter 123, Laws of 1876, and the certificate thereof made by the township clerk to the county auditor did not show all the

conditions upon which the tax was voted, as required by the statutes, except by reference to a copy of the notice of the election, which was attached to the certificate and marked and referred to as exhibit A, and so made a part of the certificate, but the board of supervisors regarded the certificate as sufficient and levied the tax, and the road was actually built according to the terms of the vote, *held* that the collection of the tax would not be enjoined on the ground that the certificate was not sufficient in and of itself, without reference to the attached notice, to give the board jurisdiction to make the levy. *Minnesota & I. S. R'y Co. v. Hiams*, 53 Iowa, 501, distinguished. *Id.*

28. —: COMPLIANCE WITH CONDITION TO CONSTRUCT AND OPERATE ROAD. Where a condition of a tax voted in aid of a railroad was that the road should be "constructed and operated" to a depot at a certain place by a given time, *held* that it was sufficiently complied with by the construction of the road to the given point by the time named, and the continuous operation of it thereafter, even though the road was not fully completed, and the depot was only a temporary one, and the service was not first-class. *Id.*
29. —: TAX NOT FORFEITED BY LEASE OF ROAD. A tax voted in aid of a railroad is not forfeited by a perpetual lease of the road made in good faith to another company. *Manning v. Mathews*, 66 Iowa, 675, distinguished. *Id.*
30. —: INCORPORATED TOWN VOTING WITH TOWNSHIP IN WHICH SITUATED. When the question is whether a township shall aid in the construction of a railroad by voting a tax, all the voters of the township, including such as reside within an incorporated town which lies wholly or in part within the township, may lawfully vote at such election. Compare *Ryan v. Varga*, 37 Iowa, 80. *Id.*
31. —: UNDUE INFLUENCE UPON VOTERS: TAX VOID. Where the citizens of a town appointed a committee to work up the voting of a railroad-aid tax in another township of the county, and the railroad company afterwards employed one of the same committee to do the same thing on its behalf, and he induced men to vote for the tax by offering to pay them fifty cents on the dollar for the certificates of taxes paid by them, *held* that the tax so voted was void on account of the undue influence so brought to bear on the voters. *Id.*

See BILL OF LADING.

RAILROAD LANDS.

1. GRANT TO DUBUQUE & PACIFIC RAILROAD COMPANY: WHEN TITLE PASSED. The title to the lands granted to the Dubuque & Pacific Railroad Company by act of congress, approved May 15, 1856, and by the act of the general assembly of the state of Iowa, approved July 15, 1856, did not pass to the company until the company had filed in the office of the governor a map or plat showing its route, and the governor had signed the same and filed it in the general land-office at Washington, as provided by section six of said last named act. It follows that lands within the six mile limit, which had been pre-empted prior to such filing, did not pass to the company or its successors. *Iowa Falls & S. C. R'y Co. v. Beck*, 421.
2. —: HOMESTEAD TITLES ACQUIRED AFTER ADJUSTMENT OF RAILROAD CLAIMS. After the claims of the railroad under said grants had been finally adjusted, as it was supposed, lands which remained were thrown open to homestead entry. *Held* that the company could not defeat the titles procured under the homestead laws, on the ground

that, after the supposed final adjustment, the title to a large amount of the lands included in said adjustment failed. *Id.*

3. ———: INDEMNITY LANDS: SELECTION NECESSARY. No claim can be maintained by the railroad company or its successors to lands as indemnity lands, unless they have first been selected as such, as provided in the act of congress relating thereto. *Id.*

REAL ESTATE.

See LAND.

REAL ESTATE AGENT.

See AGENCY AND AGENT, 1.

CONTRACT, 3.

RECORD.

1. CORRECTING OF BY TRIAL COURT AFTER APPEAL TAKEN. See Appeal, 2.
2. ON APPEAL IN INJUNCTION CASE. See Appeal, 4.
3. ON APPEAL: AGREEMENT TO EVIDENCE IN EQUITY CASE. See Appeal, 5.
4. CHANGE OF AT TERM WHEN MADE: RIGHT OF INTERESTED PARTIES TO NOTICE. See Practice, 6.
5. CHANGE OF ON CONFLICTING AFFIDAVITS: DISCRETION OF COURT. See Practice, 8.

RECOVERY OF PERSONAL PROPERTY.

See DETINUE.

REPLEVIN.

REDEMPTION.

1. FROM MORTGAGE-FORECLOSURE SALE: MISTAKE OF CLERK IN COMPUTATION: RECTIFICATION AFTER EXPIRATION OF YEAR. Plaintiff was the owner of the land in question, and was entitled to redeem the same from a school-fund mortgage-foreclosure sale, at which the county was the purchaser; and he went to the clerk's office for that purpose, and paid the clerk the amount which he (the clerk) told him was necessary to effect the redemption. But by an error in the clerk's computation that amount was too small by about six dollars. Afterwards, and before the expiration of the year for redemption, defendant procured the certificate of purchase from the county, and subsequently obtained a sheriff's deed thereon. *Held* that the deed and certificate were properly canceled by the decree of the district court, upon plaintiff's petition, and that plaintiff was entitled to perfect his redemption by paying such additional sum as, added to the amount first paid, would be equal to the amount for which the land was sold, with ten per cent interest thereon from the day of the sale to the date of such final payment. *Wakefield v. Botherham*, 444.

See MORTGAGE, 1, 6.

TAX SALE AND DEED, 1.

REMITTITUR.

See PRACTICE IN SUPREME COURT, 14.

REMOVAL OF CAUSES TO FEDERAL COURTS.

1. TRUSTEE AS PLAINTIFF: CITIZENSHIP OF BENEFICIARY NOT CONSIDERED. Where a trustee, invested by assignment with the title to the claim in suit, and authorized to prosecute it, is plaintiff and a citizen of the same state with the defendant, the cause will not be removed to the federal courts on the ground that the person beneficially interested is a citizen of another state. *Vimont v. Chicago & N. W. R'y Co.*, 64 Iowa, 513, followed. *Goodnow v. Litchfield* 691.

REPLEVIN.

1. ELECTION TO TAKE MONEY JUDGMENT INSTEAD OF PROPERTY: RIGHT TO DAMAGES FOR DETENTION. Where the plaintiff in replevin prevails, but elects, under Code, § 3241, to take a money judgment for the value of the property instead of a judgment for the possession of the property itself, he does not thereby waive his right to damages for the wrongful detention of the property by defendant. *Cook v. Hamilton*, 394.

See DETINUE.

RES ADJUDICATA.

See FORMER ADJUDICATION.

RESISTING OFFICER.

See ARREST, 1.

RIGHT OF WAY FOR RAILROADS.

See RAILROADS, *passim*.

RIPARIAN RIGHTS.

1. NAVIGABLE RIVER DECLARED NOT NAVIGABLE: EFFECT ON BOUNDARIES OF ADJACENT LANDS. Plaintiffs owned land adjacent to the Des Moines river, under patents from the government, which bounded the land by meandering lines following the banks of the river. When the lands were surveyed and the patents issued by the government, the river was regarded as navigable, but afterwards, by act of congress, the river was declared not to be navigable. Held that such act of congress did not have the effect to extend plaintiff's boundary beyond the high-water mark to the middle of the stream, and that plaintiffs could not recover the value of ice taken from the stream by defendant. *Wood v. Chicago, R. I. & P. R'y Co.*, 60 Iowa, 456, followed. *Serrin v. Grefe*, 196.

ROAD SUPERVISORS.

1. ACTS OF CONTROLLED BY INJUNCTION: GROUND OF EQUITABLE INTERFERENCE. Equity will interfere by injunction to restrain road supervisors from removing or interfering with fences, hedges, water-courses, and the like, in the discharge of their official duties. (See cases cited in opinion.) Relief in these cases is not based upon the irreparable character of the injury and the insolvency of the defendant, but on sound views of public policy, and is for the protection of the officer as well as of the private citizen. *Bolton v. McShane*, 207.

RULES OF COURT.

1. AUTHORITY OF DISTRICT AND CIRCUIT COURTS TO ADOPT. See Appearance, 1.

SALE.

1. OF MACHINE: WARRANTY: WAIVER OF CONDITIONS OF: EXAMPLE. A party who sells upon a conditional warranty may waive such of the conditions as were intended for his benefit. Accordingly, where plaintiff sold to defendant a machine warranted to do good work, but with a provision that, if it failed on trial, defendant should give them notice thereof, and of the nature of the defects, in writing, and afford them an opportunity to repair or remove the defects; but they responded to a notice by telegraph, and sent an agent to fix the machine, held that they thereby waived their right to object to the notice as not being in writing, and as not being as full and formal as they were entitled to under the contract. *Wendall v. Osborne*, 63 Iowa, 99, distinguished. *Davis' Sons v. Robinson*, 355.
2. WARRANTY: WAIVER OF BY FAILURE TO PERFORM CONDITION. The contract in question provided that if the defendant did not make full settlement for the machine when delivered to him he would thereby waive the warranty. By another provision of the contract, defendant agreed, upon the delivery of the machine, to make certain notes for a part of the purchase price, and to pay in cash, in an old machine, \$150. Held that by failing to deliver the old machine, as per contract, at the time he received the new one, defendant forfeited his rights under the warranty. *Id.*
3. OF LAND: ACCEPTANCE OF PROPOSITION: WHAT IS NOT. There is no contract of sale unless the proposition to sell is accepted in all its terms and without conditions. So there was no sale of the land in question, where the offer was to take notes payable annually, but the notes proposed to be given were payable at the option of the maker, and where the acceptance of the offer was conditioned upon a fact yet to be ascertained. *Siebold v. Davis*, 560.
4. OF LAND: AUTHORITY OF AGENT. See Agency and Agent, 1.
5. OF LAND ON COMMISSION: DUTY OF OWNER TO MAKE CLEAR TITLE. See Contract, 3.
6. OF BUSINESS WITH GOOD WILL. See Contract, 4, 5, 6, 9.
7. OF LAND: EXCESS OF AUTHORITY BY AGENT. See Principal and Agent, 7.

SCHOOL DIRECTORS.

1. PURCHASE OF SCHOOL FURNITURE: FRAUDULENT IMPOSITION UPON MEMBERS OF SCHOOL BOARD: INDIVIDUAL LIABILITY. Where certain members of the board of school directors of a district township were induced by plaintiffs to sign a contract to pay for certain school furniture to be bought of plaintiffs, upon the false representation that the president of the board had agreed to and would sign it,—the validity of the contract being conditioned by its terms upon its being signed by a majority of the board,—held that it was void, on account of fraud, as to those who signed it upon the false representation above stated; and that, since without their signatures it was not signed by a majority of the board, it was not binding upon the others who signed it without being misled by such misrepresentations. *Mills & Co. v. Collins et al.*, 164.
2. FORESTALLING DELIBERATE ACTION BY PERSONAL OBLIGATIONS: PUBLIC POLICY: FRAUD. Contracts artfully drawn for the purpose of cap-

turing the members of school boards separately, by involving them in a personal obligation, and thus forestalling their deliberate and untrammelled action as a board, are not in accord with public policy, and are not to be favored in law; and when fraud is added in obtaining the signatures of members, such a contract cannot be upheld. For example see opinion. *Id.*

SETTLEMENT.

1. **PRESUMED FROM EXECUTION OF MORTGAGE.** The execution of a mortgage to secure an indebtedness, like the execution of a promissory note, (*Grimmell v. Warner*, 21 Iowa, 11,) raises a presumption that all matters between the parties up to that date have been settled. *Allen v. Bryson*, 591.
2. **OF CONTROVERSY: GOOD CONSIDERATION FOR CONTRACT.** See Consideration.

SEWERS.

1. **COST OF CONSTRUCTION.** See Cities and Towns, 9.

SIDEWALKS.

1. **INJURY THROUGH DEFECTIVE WALKS.** See Cities and Towns, 3; Evidence, 4, 5.

SKATING RINK.

1. **EXCLUSION OF COLORED PERSON FROM: DAMAGES.** See Civil Rights, 1.

SPECIFIC PERFORMANCE.

See AGENCY AND AGENT, 1.

STATUTES.

1. **CONFLICT: RULE OF CONSTRUCTION: TAXATION OF RAILROADS.** Where there are two statutes which relate to the same subject matter, they should be construed, if it can reasonably be done, so that both may have force and effect. Under this rule, the statute providing for the assessment of railroad property in March of each year (Code, § 1317) is not in conflict with the statute (Code, § 812) providing for the assessment of real estate in January of each alternate year. *Cent. Iowa R'y Co. v. Board of Supervisors*, 199.
2. **ENACTMENT OF: APPROVAL OF GOVERNOR: WHEN NECESSARY.** See Legislation, 1.
3. **OF SISTER STATE: PRESUMPTION AS TO.** See Notary Public, 1.

See CONSTITUTIONAL LAW.

STATUTES CITED, CONSTRUED, ETC.

STATUTES CITED, CONSTRUED, ETC.

[The words in Roman type indicate the subject under consideration, and the figures following refer to the page in this volume where the statute is cited.]

REVISION OF 1860.	Sec. 178. Power of court to amend record. 176, 178, 353.
Sec. 710, 711. Lands: When taxable. 658	" 180. Power of court to make rules. 658.
" <i>et seq.</i> 1420. Bastard child: Bond to county for maintenance, 56.	" 200. Entries in appearance docket. 501.
CODE OF 1873.	" 234, 239. Grand jurors: When selected: Term of service. 232.
" 169. Adjournment of court. 559.	" 240, 244. Drawing grand jury. 143.

STATUTES CITED, CONSTRUED, ETC.—CONTINUED.

- Sec. 457. Cities and towns: Fire limits. 211 *et seq.*
 " 464. Railways on streets: Damages. 513, 570.
 " 465, 466. Sewer tax in cities. 692, 693.
 " 482. Cities and towns: Powers of. 211 *et seq.*
 " 489. Cities and towns: Order for payment of money. 411.
 " 812. Assessment of real estate. 200.
 " 814, 817. Assessment: Deduction of debts: Property in hands of agent. 184, 185.
 " 894. Redemption from tax sale: Time. 25: Notice to redeem: Proof of service. 603.
 " 894, 895. Tax sale: Proof of service of notice to redeem. 223, 224.
 " 902. Tax deed: Statute of limitations. 602, 603.
 " 1207-1235. (Chap. 2, title 10.) Drains, ditches and water-courses. 696.
 " 1214. Public ditches: Apportionment of expense. 698.
 " 1288. Railroads: Where to make cattle-guards. 294.
 " 1292. Railroads: Duty to draw cars of other roads. 717.
 " 1302. Railroad aid tax: Stock to tax payer. 733.
 " 1317. Assessment of railroads. 200, 201.
 " 1332-1334. Paupers: Bastard child: Security to county. 56.
 " 1381. Poor tax: Repeal. 542 *et seq.*
 " 1498. Division lines and fences. 563.
 " 1526, 1540, 1542, 1543. Sale of liquors by clerk: Intention of employer. 29, 30.
 " 1527. Intoxicating liquors: Repeal. 706, 707.
 " 1927. Possession of mortgaged chattels. 668.
 " 1940. Vendor's lien. 234.
 " 1976-1987. Occupying claimant. 651.
 " 1990. Relinquishment of homestead right. 100.
 " 1995. Execution sale of homestead. 84.
 " 2015. Termination of cropper's lease. 117; Notice to quit. 545.
 " 2075. Interest on judgments. 726.
 " 2084. Assignment of non-negotiable instruments. 534.
 " 2089. Guaranty of note. 14.
 " 2097. Contract for delivery of property: Money demand. 117.
 " 2118. Consideration: Contract in writing. 219, 686.
 " 2115-2128. Assignment for benefit of creditors. 583, 611.
 " 2120. Assignment for benefit of creditors: Report of assignee. 130.
 " 2126. Assignment for benefit of creditors: Time for filing claims. 120 *et seq.*
 " 2211. Wife's right to earnings. 508.
 " 2241. Authority of parent as natural guardian. 465.
 " 2243, 2246, 2249, 2250. Authority of general guardian. 463 *et seq.*
 " 2307-2311. Adoption of child under guardianship. 463 *et seq.*
 " 2312, 2315. Administrators: Court must appoint when in session. 318.
 " 2365. Administrators: Letters issued by clerk. 318.
 " 2375, 2377. Estates of decedents: Support of widow. 111, 112.
 Sec. 2379, 2380. Estates of decedents: Discovery of assets: Contempt. 74.
 " 2418, 2419, 2420. Estates of decedents: Payment of widow's allowance. 112.
 " 2421. Estates of decedents: Equitable relief to claimants. 121, 459.
 " 2436. Widow's share of personality. 259.
 " 2452. Widow's assent to provisions of will. 262.
 " 2472. Appeal: Certification of evidence. 430.
 " 2510. Mechanic's lien: Foreclosure: No joinder. 490.
 " 2532. Statute of limitations: Beginning of action: Delivery of notice to constable. 194, 196.
 " 2582-2584. Railroads and insurance companies: Where sued. 743, 744.
 " 2586. Personal action: Venue. 710.
 " 2589. Action in wrong county. 667.
 " 2599. Appearance day: Rules of court. 688.
 " 2603. Service of original notice. 225.
 " 2618. Original notice: Affidavit for publication. 501.
 " 2634. Misjoinder of causes: Division. 490.
 " 2635. Answer: Denial of knowledge and information. 189.
 " 2659, 2661. Counter-claim in action against surety. 82, 83.
 " 2657. Pleading: Each defense in separate count. 360.
 " 2669, 2673. Verification of pleadings. 171.
 " 2699. Amendment after appeal. 629.
 " 2692. Pleading: Petition and amendment construed together. 503.
 " 2704. Evidence under general denial. 678.
 " 2730. Promissory note: Signature denied: Burden of proof. 733.
 " 2772. Challenge to jurors. 122.
 " 2789. Appeal: Instructions not excepted to. 230.
 " 2790. View of property by jury. 239.
 " 2791. Jury in consultation: Communications with. 506.
 " 2798. Jury of less than twelve unconstitutional. 297.
 " 2797. Jury: Taking evidence to jury-room. 148, 506.
 " 2838. New trial: Newly discovered evidence: Time. 691.
 " 2871. Vacating judgment by default: Showing of merits. 684.
 " 2877. New trial: Notice by publication. 520.
 " 2975. Garnishment: Notice: Jurisdiction. 85.
 " 3011. Judgment in attachment. 404.
 " 3072. Exemption from execution. 450.
 " 3080, 3081. Execution sale without notice: Damages and penalty. 295.
 " 3102, 3106, 3118, 3119. Redemption from execution sale: Time, terms and mode. 446, 447.
 " 3135. Execution: Examination of debtor. 620.
 " 3135, 3137-3141, 3145. Examination of execution defendant. 625, 626.
 " 3145. Execution: Examination of debtor: Contempt. 621.
 " 3164. Appeal from judgment on demurrer. 218.
 " 3164, 3165. From what an appeal will lie. 701.

STATUTES CITED, CONSTRUED, ETC.—CONTINUED.

- Sec. 3154. Vacating judgment: Unavoidable misfortune. 407.
 " 3154, 3157. Vacating judgment. 314.
 " 3170. Appeal of equity case: Agreement as to evidence. 431.
 " 3183. Assignment of errors: Time. 360.
 " 3207. Assignment of errors: Exactness. 614.
 " 3216. Certiorari: When not allowed. 176, 703.
 " 3225. Replevin: Venue. 683.
 " 3228. Replevin: Bond. 686.
 " 3233, 3239, 3241. Replevin: Judgment for value of property. 365, 665, 666.
 " 3265. Recovery of real property when crop sowed. 613.
 " 3312. Execution sale: Title of purchaser. 524.
 " 3323. Mortgage: Redemption: Right to assignment. 33.
 " 3370. Fines and forfeitures: What county entitled to. 457.
 " 3373. Mandamus. 63.
 " 3389-3394. Injunction in vacation. 80.
 " 3396. Injunction to restrain execution: Venue. 710.
 " 3491. Contempt of court. 108.
 " 3495, 3498. Contempt: Right to make written explanation. 105.
 " 3507. Jurisdiction of justices. 743, 744.
 " 3521. Justices' court: Notice of suit with no time named. 194.
 " 3511. Forcible entry and detainer. 613.
 " 3514, 3517. Action of forcible entry and detainer: Notice: Appearance. 545, 547.
 " 3539. Evidence against administrator. 256.
 " 3549. Evidence: Credibility of witness: Moral character. 144.
 " 3551. Contract: Writing controls print. 90.
 " 3559. Evidence: Acknowledged instrument. 65.
 " 3751. Notice by clerk of filing depositions. 173.
 " 3790. Bastardy: Costs: Liability of county. 65.
 " 3960. Realisting officer. 500.
 " 4023. Disturbing meeting: Jurisdiction of justice. 554.
 " 4313. Indictment: Name of party injured. 145.
 " 4545. Imprisonment after appeal on second conviction. 265.
 " 4569. Criminal evidence: Corroboration of accessory. 220.
 " 4715-4722. Bastardy: Civil action. 85.

LAWS OF 1876.

- Chap. 100, § 7. (Miller's Code, § 2134.) Mechanic's lien: Sub-contractor. 67.
 " 120, §§ 3, 4. (McClain's St., 96.) Township trustees: Land for cemeteries. 62.
 " 143. Taxation in aid of railroads. 729 *et seq.*
 " 149. Poor tax. 542.

LAWS OF 1878.

- Chap. 59. (Miller's Code, § 365.) Assessment of telephone property. 251.
 " 77. (Miller's Code, § 352.) Railroads: Discriminations: Treble damages. 714 *et seq.*
 " 173. Taxation in aid of railroads. 729.

LAWS OF 1880.

- Chap. 58. Garnishment: Notice: Jurisdiction. 85.
 " 75. Intoxicating liquors: Apothecaries. 617, 642.
 " 85. Warrants on drainage fund. 698.
 " 146. Cities and towns: Orders for payment of money. 411.
 " 211. (Miller's Code, § 290.) Fire insurance: Action on policy. 392.

LAWS OF 1882.

- Chap. 35. (McClain's St., § 3742.) Appeal: Certification of evidence: Time. 280.
 " 40. Exemption from execution: Waiver. 450.

LAWS OF 1884.

- Chap. 143. Intoxicating liquors: Apothecaries. 617.

CONSTITUTION OF IOWA.

- Art. 1, § 6. Uniform operation of laws. 201.
 " 1, §§ 9, 10. Trial by jury: Due process of law: Punishment for contempt. 621, 626.
 " 3, § 16. Legislation: Approval of governor. 706, 707.

CONSTITUTION OF UNITED STATES.

- 14th Amendment: Uniform operation of laws. 201.

STATUTE OF LIMITATIONS.

1. WHAT IS BEGINNING OF SUIT: ORIGINAL NOTICE WITH APPEARANCE DAY LEFT BLANK. A notice of an action, with the appearance day left blank, is not an "original notice" within the meaning of § 2532 of the Code; and the delivery of such a notice by a justice of the peace to a constable for service, with the understanding that the latter should insert the appearance day at or before the time of service, *held* not to be the beginning of an action within the meaning of said section; and where action was not otherwise begun on the promissory note in question until more than ten years after the note was due, action thereon was barred by the statute of limitations. (Compare *Jones & Magae Lumber Co. v Boggs*, 63 Iowa, 589.) *Phinney v. Donahue*, 192.

2. **NON-RESIDENT DEFENDANT: CAUSE OF ACTION ARISING IN THIS STATE: INSTANCE.** A cause of action arising in this state is not barred by the statute of limitations when the defendant has always resided in another state, though it might be barred by the laws of the state of his residence; and an action to recover taxes paid by mistake on the land of another in this state, and to enforce a lien thereon, is based upon a cause arising in this state. *Goodnow v. Stryker*, 62 Iowa, 221, followed. *Bradley v. Cole*, 650.
3. **CLAIM AGAINST ESTATE: EQUITABLE CONSIDERATIONS.** See Estates of Decedents, 6.
4. **APPLICATION TO AMOUNT TO BE PAID IN REDEEMING FROM TAX SALE.** See Tax Sale and Deed, 1.
5. **APPLICATION TO TAX TITLES.** See Tax Sale and Deed, 3.

STREETS.

1. **DEDICATION OF.** See Cities and Towns, 1.
2. **LOSS OF BY NON-USER.** See Cities and Towns, 2.
3. **RIGHT TO GRADE STREET: SURFACE WATER: FORMER GRADE.** See Cities and Towns, 6, 7.
4. **PAVED STREET INJURED BY CONSTRUCTION OF SEWER: COST OF REPAIRING.** See Cities and Towns, 9.

SUPREME COURT.

1. **JURISDICTION OF.** See Appeal, 1, 3, 5, 6, 8, 10.
2. **STATE AND FEDERAL: CONFLICT IN INTERPRETATION OF STATUTES: WHICH PREVAILS.** See Courts, 1.

See PRACTICE IN SUPREME COURT.

SURETY.

1. **ON RESTITUTION BOND IN ATTACHMENT: DISCHARGE OF BY CREDITOR'S RELEASE OF PRINCIPAL DEBTOR'S PROPERTY: LIMITATION OF THE RULE.** The relinquishment by the creditor, without the consent of the surety, of any hold which he has actually acquired on the property of the principal debtor operates to discharge the surety to the extent of the value of the property so relinquished. (See authorities cited in opinion.) But where the creditor's hold on the property is of doubtful validity, and it is relinquished by way of a compromise made in good faith, and the proceeds of the compromise are applied in discharge of the debt *pro tanto*, the surety will not be discharged in the absence of a showing that an attempt to subject the property would have resulted more favorably, even though it subsequently appear, by evidence not before available, that the property was equitably liable for the payment of the debt. *Bedwell v. Gephart*, 45.
2. **—: MOTION FOR JUDGMENT AGAINST: DEFENSE NOT PLEADED FOREVER BARRED.** Where sureties in a restitution bond in attachment are called into court upon a motion for judgment against them on the bond, and they wish to avail themselves of the fact that the creditor has relinquished property of the principal debtor which was subject to be sold in discharge of the debt, they must then plead such defense, and, if they fail so to do, they cannot afterwards be heard to claim a credit on the judgment to the extent of the value of the property so relinquished. See authorities cited in opinion. *Id.*

3. **DISCHARGE OF BY CREDITOR'S RELEASE OF FUND CHARGED WITH PAYMENT OF DEBT.** The release by a creditor of a collateral security operates to discharge a surety for the same debt to the extent of the security released, unless the surety consents to such release. So *held* in this case, where a receiver had in his hands funds sufficient to pay the debt, and he had been ordered by the court to pay it, but the creditor, without the consent of the surety, accepted a portion of the amount due, and receipted to the receiver for the whole debt, which receipt the receiver used in making his settlement and procuring his discharge. *Heitz v. Atlee*, 483.
4. **RELEASE OF SURETY ON NOTE BY EXTENSION OF TIME.** See Promissory Note, 5.

See PRINCIPAL AND SURETY.

TAKING PRIVATE PROPERTY.

See RAILROADS, *passim*.

TAXATION.

1. **EQUALIZING ASSESSMENTS: EVIDENCE CONSIDERED.** The defendant raised plaintiff's personal assessment from \$440 to \$10,440, and assessed him as agent in the sum of \$20,000, but, on appeal to the circuit court, his personal assessment was reduced to \$440, and his assessment as agent was stricken out. Upon consideration of the evidence, (see opinion,) *held* that the judgment of the circuit court was just and right. *Hutchinson v. Board of Equalization, etc.*, 37.
2. **DEDUCTION OF INDEBTEDNESS FROM MONEYS AND CREDITS: PROPERTY IN HANDS OF AGENT.** Whether the tax-payer is entitled to have an acknowledgment of indebtedness deducted from the amount of moneys and credits which he is required to list for assessment, depends on whether it is founded on an actual consideration. Code, § 814. If it is, and it evidences an actual indebtedness, he is entitled to have it deducted, regardless of the motive which may have induced him to incur the obligation. And so, where plaintiff, as the agent of some English capitalists, had invested certain moneys of theirs and controlled the securities, but, to avoid paying taxes thereon under § 817 of the Code, he caused the securities to be assigned to himself, and executed his own obligations to the capitalists for the amount thereof, *held* that he was entitled to have the obligations thus incurred deducted from the amount of his moneys and credits, including the securities thus taken to himself, and that he was no longer liable to be taxed on such securities as agent. *Hutchinson v. Board of Equalization*, 182.
3. **ASSESSMENT NECESSARY: ATTEMPT TO COLLECT WITHOUT ASSESSMENT.** The taxing power can be enforced only in accordance with the forms of law, and an assessment by legal authority is an indispensable step in the exercise of that power. Hence, where the board of supervisors, discovering that no assessment had been made, passed a resolution as follows: "The assessor having failed to assess the personal estate of R., the treasurer is instructed to present a bill for the taxes in said estate to the executor for the year 1884," *held* that the executor could not, under such proceedings, be compelled to pay taxes on such estate, and that an action therefor would not lie. *Worthington v. Whitman*, 190.
4. **IMPROVEMENTS ON REAL ESTATE AFTER ASSESSMENT.** Improvements placed on real estate after assessment escape taxation until the lands are again assessed, two years later. Code, § 812. *Richards v.*

Wapello County, 48 Iowa, 507, followed. *Cent. Iowa R'y Co. v. Board of Supervisors*, 199.

5. **TELEPHONE PROPERTY: HOW ASSESSED.** The lines and property of telephone companies are to be assessed in the manner provided for the assessment of telegraph lines and property; that is, by the state board of equalization; (Chap. 59, Laws of 1878;) and the board of equalization of a city has no power to assess the same. *Iowa Union Teleph. Co. v. Board of Equalization*, 250.
6. **POWER OF COUNTY TO LEVY POOR TAX.** See *County*, 8.
7. **OF LANDS DERIVED FROM GOVERNMENT: WHEN TAXABLE.** See *Courts*, 1; *Public Lands*, 1.
8. **OF RAILROAD PROPERTY.** See *Railroads*, 9.

TAXES.

1. **ON LAND: PAYMENT BY HOLDER OF SHERIFF'S DEED: FAILURE OF TITLE: RECOVERY OF REAL OWNER'S GRANTEE WITH NOTICE: LIEN.** Where one holds a sheriff's deed to land, and, relying in good faith upon his title under such deed, he pays the taxes on the land, but the title is afterwards adjudged to be in another, he may have a lien established upon the land, as against such other person's grantee with notice, for the amount of the taxes so paid, and may have a personal judgment against such grantee for such portion of the taxes as were paid after he became the owner of the land; and one who takes the land by a mere quitclaim is charged with notice of the equities of the person so paying the taxes. See opinion for cases followed and distinguished. *Bradley v. Cole*, 650.
2. **ON LAND: PAYMENT THROUGH MISTAKE AS TO TITLE: RECOVERY FROM REAL OWNER: INTEREST: LIEN: STATUTE OF LIMITATIONS: FORMER ADJUDICATION.** Many of the questions raised in this case, having been often determined by this court, (see cases cited,) are not again argued in the opinion. *Goodnow v. Wells*, 654; *Goodnow v. Plumb*, 661.
3. **PAYMENT IN GOOD FAITH ON ANOTHER'S LAND: RECOVERY.** Where one, not officiously, but in good faith, relying upon a belief that he has a good title to lands, pays the taxes thereon, but the title is subsequently adjudged to be in another, he may recover of the owner of the lands the amount of the taxes so paid, with six per cent per annum interest on each payment. *Goodnow v. Litchfield*, 691.
4. **SPECIAL TAX: ACTION TO COLLECT: NO COUNTER-CLAIM ALLOWED.** See *Cities and Towns*, 10.
5. **IN AID OF RAILROADS.** See *Railroads*, 3, 29, 34.

TAX SALE AND DEED.

1. **SALE: TERMS OF REDEMPTION FROM: SUBSEQUENT TAXES: STATUTE OF LIMITATIONS.** Defendant in this case had a valid tax certificate on which he had the right, at the commencement of this suit to redeem therefrom, to give the proper notice and take his tax deed. Held that the plaintiff (holder of the patent title) had the right to redeem, but to do so he was bound to pay the taxes and penalties provided by law, regardless of the statute of limitations. *Harber v. Sexton & Son*, 66 Iowa, 211, followed; *Brown v. Painter*, 44 Id., 368, and subsequent like cases, distinguished. *Long v. Smith*, 22.
2. **SALE AND DEED: NOTICE TO REDEEM: PROOF OF SERVICE OF: STATUTE MUST BE FOLLOWED.** The provision of § 894 of the Code, that

the notice of the expiration of the time for redemption shall be served upon residents of the county "in the manner provided by law for the service of original notices," prescribes only the manner of service, and not the person or officer who shall make the service or return of service; and service and return by the sheriff of the county in the manner in which original notices are served and returned are not sufficient to warrant the treasurer in issuing a tax deed ninety days after such notice and return are filed in his office. The further provision of said section, that "service shall be deemed completed when an affidavit of the service of such notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer," must be complied with before a valid deed can be issued. *Ellsworth v. Van Ort*, 222.

3. SALE AND DEED: DEFECTIVE PROOF OF SERVICE OF NOTICE TO REDEEM: PROOF AND DEED: STATUTE OF LIMITATIONS. Where notice of the expiration of the time of redemption from a tax sale was duly given, but the proof of the service of the notice, though made by the proper party, was defective only in not stating some of the facts required by the statute, *held* that the proof of service and the deed issued thereon were not void, but were sufficient, after the lapse of five years, to enable the holder of the deed successfully to plead the statute of limitations (Code, § 902) against the holder of the patent title in an action to recover the land. *Trulock v. Bentley*, 602.

TAX TITLE.

See TAX SALE AND DEED.

TELEGRAPH COMPANIES.

1. NEGLIGENCE IN TRANSMITTING MESSAGE: MEASURE OF DAMAGES: PROSPECTIVE PROFITS. Plaintiff's agent at Vicksburg, Michigan, telegraphed him the price at which he could buy a car load of apples, but the telegram as delivered purported to come from Vicksburg, Mississippi, where plaintiff had no agent, and to be signed by one unknown to plaintiff, in consequence of which plaintiff paid no attention to it. Afterwards the price of apples advanced, and plaintiff in buying was obliged pay more than the price named in the telegram. *Held* that plaintiff's loss was not greater than the difference between a car load of apples at the price named in the telegram, and such greater amount, if any, as a car load was worth in the same market at the time the telegram was sent; and that, there being no evidence of such difference, plaintiff was entitled to recover only the amount paid for the telegram. *Pennington v. Western Union Telegraph Co.*, 631.

TELEPHONE COMPANIES.

1. HOW ASSESSED. See Taxation, 5.

TOWNSHIP TRUSTEES.

1. CEMETERIES: DISCRETION AS TO USE OF LAND FOR: MANDAMUS. Although township trustees have bought land for a cemetery, they still have a discretion as to its use, and they cannot be compelled by *mandamus* to devote it to that purpose, if for any reason they deem it unsuitable. *Christy v. Whitmore*, 60.

See PAUPERS, 1.

TRESPASS.

1. INJUNCTION TO PREVENT. See Injunction, 2.

TRIAL BY JURY.

See JURY TRIAL.

TRIAL DE NOVO.

1. WHEN EVIDENCE MUST BE CERTIFIED. See Appeal, 3.
2. EVIDENCE NECESSARY. See Practice in Supreme Court, 18, 23.
3. EQUITY CAUSE REMANDED TO CORRECT MISTAKE IN PLEADING. See Practice in Supreme Court,, 30.

USURY.

1. GUARANTOR MAY PLEAD. See Promissory Note, 2.

VACATION OF JUDGMENT.

See JUDGMENT AND DECREE.

VENDOR AND VENDEE.

1. SALE OF PART OF TRACT SUBJECT TO MORTGAGE ON WHOLE: ATTACHMENT OF VENDEE'S INTEREST: PRIORITY. A tract of land was incumbered with two mortgages, and the owners sold and conveyed a portion of it to F. by warranty deed, excepting, however, the two mortgages from the covenant of warranty, and reciting that the land was sold subject to the mortgages. F. orally agreed to pay the mortgages, and the amount due thereon was recited as a part of the consideration for the land. The mortgages and the deed were of record. Afterwards the land so conveyed was attached as the property of F., but the attaching creditors had no notice of F.'s oral agreement to pay the mortgages. *Held* that the papers of record were sufficient notice that the land at least was charged with the whole of the mortgage debts, and that F.'s grantors were entitled, as against the attaching creditors, in an action to foreclose the mortgages, to a decree that the land so sold to F. should first be exhausted in payment of the mortgage debts, before the other land covered by the mortgages, and still held by them, should be sold for that purpose. *Iowa Loan and Trust Co. v. Mowery*, 113.
2. TITLE BURDENED BY DECREE AGAINST VENDOR. One who takes a deed to land, after a decree has been entered against his grantor affecting the title, takes it subject to the terms of the decree. *Butler v. Barkley*, 491.
3. PURCHASE SUBJECT TO LIEN: LIABILITY OF VENDEE. One who purchases land subject to incumbrances, without expressly agreeing to pay the incumbrances, does not thereby bind himself to pay them. See cases cited in opinion. *Rice v. Hulbert*, 724.

VENDOR'S LIEN.

1. ACTION TO ENFORCE: FACTS NOT ENTITLING TO RELIEF. Action to enforce a vendor's lien against a purchaser from the vendee. But it appearing that the lien was not preserved by any recorded instrument, and that there was no fraud or collusion between the vendees, *held* that the lien could not be recognized or enforced. Code, § 1940. *Dean v. Scott*, 233.

2. **FACTS TO SUSTAIN.** Plaintiff conveyed the land to defendant in consideration of a cash payment, and a promise of defendant to execute a mortgage back on the land to secure the payment of the balance of the purchase money, unless he should sooner convey to plaintiff a good title to certain other lands in payment of the balance. Defendant did not convey the other lands, but he executed a mortgage and had it placed on record, differing in its terms, however, from the one agreed on; but plaintiff did not accept the mortgage. *Held* that plaintiff had a vendor's lien on the land conveyed to defendant, which was properly enforced in this action. *Huff v. Olmstead*, 598.

VENUE.

1. **PERSONAL ACTION FOR DAMAGES, AIDED BY INJUNCTION TO RESTRAIN COLLECTION OF JUDGMENT: REMOVAL TO COUNTY OF DEFENDANT'S RESIDENCE: INJUNCTION DISSOLVED.** Defendant, a resident of Jasper county, through his negligence as plaintiff's attorney, (as plaintiff alleges,) allowed other parties to procure a judgment against plaintiff in the district court of Scott county, which judgment defendant afterwards purchased, and was about to enforce against plaintiff's homestead. Plaintiff in this action, also brought in the district court of Scott county, seeks to recover damages against defendant for his negligence, and to offset the same against the judgment, and to enjoin the collection of the judgment pending the action. Defendant moved for a change of the place of trial to the county of his residence, and for a dissolution of the injunction. *Held* that both motions should have been sustained because—

- (1) The action for damages, being a mere personal action, should have been brought in the county of defendant's residence, (Code, 2536,) and the injunction in aid thereof, conceding it to have been properly allowed, did not necessitate the bringing of the action in Scott county, under § 3396 of the Code, because it was not based on any alleged defect or invalidity in the judgment, but on facts subsequently arising; and to such a case the statute does not apply.
- (2) The injunction should have been dissolved because the judgment was admitted to be valid and subsisting, and in the absence of an allegation of defendant's insolvency, plaintiff was not entitled to have execution delayed in order that he might offset his demand in case of recovery. *Baker v. Ryan*, 708.

2. **OF ACTIONS TO RECOVER CHATTELS.** See *Detinue*, 2.

VERDICT.

1. **DIRECTION OF BY COURT.** See *Practice*, 4, 7.
2. **EVIDENCE TO SUPPORT.** See *Practice in Supreme Court*, 8, 25, 27.

VOLUNTARY CONVEYANCE.

1. **MISDESCRIPTION: REFUSAL OF EQUITY TO REFORM DEED AND QUIET TITLE.** Courts of equity will not assist the grantee in an imperfect conveyance, which is not supported by either a valuable or meritorious consideration, against either the grantor or his representatives. (See authorities cited in opinion.) And so, where defendant, to whom her mother owed no duty that she did not owe to her other children, procured from her mother, without consideration, a deed, alleged to have been intended as a conveyance of certain land owned by the mother, but which did not describe the land in question, and thus failed to operate as a legal conveyance of it, *held* that she (defendant) was not, after the death of the mother, entitled to a decree in equity against the other heirs of her mother, reforming the deed so as to describe the

land intended to be conveyed, as alleged, but that the other heirs were entitled to a decree quieting in them severally such interest in the land as they were entitled to by inheritance. *Else v. Kennedy*, 376.

WARRANTY.

See SALE, 1, 2.

WATER AND WATERCOURSES.

1. DIVERSION OF SUBTERRANEAN STREAM: RULE STATED AND APPLIED. When one in good faith sinks a well on his own land, the owner of a well on adjoining land has no cause of complaint if the water from his well is drawn off or decreased by percolation through the earth; but when subterranean water flows in a distinct channel, an adjoining owner has no more right to divert its course than if the stream were on the surface of the earth. And so, where plaintiff had an artesian well on his land, and defendants afterwards, by boring on their adjoining land, interrupted the same stream, thereby causing the water to cease flowing in plaintiff's well, but the quantity of water was ample for both parties, and could easily be made to flow at both wells by a simple adjustment of defendants' pipes, *held* that defendants were properly required so to adjust their pipes as not to cut off plaintiff's supply of water, and that an injunction was properly granted to secure that end. *Burroughs v. Saterlee*, 396.
2. SURFACE WATER IN CITIES. See Cities and Towns, 6.

WILL.

1. CONSTRUCTION OF: PROVISION FOR WIFE—WHETHER IN LIEU OF DOWER OR NOT: RULE OF CONSTRUCTION IN SUCH CASES. Unless a devise to the wife, to be ascertained either from express words or by necessary implication, is clearly intended to be in lieu of dower, she will not be compelled to elect which she will take, but will be entitled to both. But in this case, where the testator in the second paragraph of his will gives certain property to his wife by description, and in the third, fourth and fifth paragraphs gives certain legacies, and in the sixth paragraph disposes of all the residue of his property without description, and then, in the seventh paragraph, provides for the sale of the remainder of his real estate for the purpose of carrying out the devises named in the sixth paragraph, *held* that the manifest intent of the testator would be defeated by allowing the widow to take the portion given her by the will, and also one-third of the real estate not devised to her. See copy of will set out in opinion. *Snyder v. Miller*, 261.
2. DEVISE TO EXECUTORS IN TRUST FOR CHILDREN; CONSTRUCTION OF CONDITION—WHETHER CONDITION PRECEDENT TO TITLE IN CHILDREN, OR CONDITION FOR TERMINATION OF TRUST. The testator bequeathed to his executors, in trust for his children, certain real estate, with the following provision, among others: "My said executors shall have the management and control of said property by me devised to them in trust for my said children, and they are to have the control and management thereof until they shall get married; and when any of my said children shall marry, with the consent of said executors, any worthy person, then the part or portion of property herein devised, or the proceeds thereof, * * * shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof, so as to vest the absolute title in said legatee." *Held* that the marrying of a child with the consent of the executors was

not a condition precedent to the vesting in him or her of an interest in the estate, but only a condition for the termination of the trust as to one so marrying; and that the will, considered as a whole, vested in the children, upon the death of the testator, a present equitable interest in the estate. Consequently, where one of the daughters died at the age of twenty-two, unmarried, and bequeathed to B. all her property, personal and real, and all her interest in her father's estate, either as heir or devisee under his will, *held* that her death terminated the trust as to the property bequeathed to the executors for her use, and they were properly decreed by the court below to convey the legal title thereof to B. *Toner v. Collins*, 369.

WITNESS.

1. CREDIBILITY OF: QUESTION FOR JURY. Whether witnesses are worthy of belief is a question for the jury, and not for the appellate court. *Beams v. Chicago, R. I. & P. R'y Co.*, 435.
2. MAY NOT BE CONTRADICTED AS TO IRRELEVANT MATTER. See Practice, 1.

WORDS AND PHRASES.

1. "VACATION" OF COURT. See Injunction, 1.

Ex. G. A. A.



